

Guyana's REDD+ Model and Amerindian Rights

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By

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## **Abstract**

Guyana's REDD+ model features the placement of almost all of the country's rainforest under long-term protection in return for monetary incentives that will be used to move the country along a low carbon development trajectory. It is a model of forestry preservation and sustainable development that the Government of Guyana is developing in partnership with the Government of Norway. This model of development is part of the global climate change mitigation scheme, Reducing Emissions from Deforestation and Degradation plus (REDD+). REDD+ is a series of initiatives focused on/in developing countries seeking to diminish carbon dioxide emissions caused by deforestation and degradation, processes recognized as being one of the leading causes of climate change. It aims to dramatically reduce these emissions by creating an incentive mechanism that will pay developing countries to halt destructive processes that lead to deforestation and degradation.

Guyana's REDD+ model has significant implications for Amerindians who occupy the forested regions of Guyana, where most REDD+ related activities are scheduled to take place. Although this model is developing in a context where the legal and political regime governing Amerindians is weak, the treatment of Amerindians in REDD+ development leaves much to be desired in terms of both recognition and protection of important human rights.

This Thesis reviews Guyana's pioneering REDD model to show that it is failing to safeguard Amerindian rights recognized under international human rights law. Within the framework of the law, it argues that Guyana's actions are contrary to its international obligations regarding indigenous peoples. Appropriate measures that should be adopted by Guyana to safeguard Amerindian rights are explored and proposed in this thesis. Possible measures that can be adopted by Norway, the World Bank, and the international community to motivate Guyana to undertake reforms are also examined.

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## Table of Abbreviations

APA	Amerindian Peoples' Association
COP	Conference of the Parties
CDB	Convention on Biological Diversity
CERD	Convention on the Elimination of Racial Discrimination
CRC	Convention on the Right of the Child
EIA	Environmental Impact Assessment
ESIA	Environmental and Social Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IIED	International Institute for Environment and Development
IPCC	Intergovernmental Panel on Climate Change
FCPF	Forest Carbon Partnership Facility
FPIC	Free, Prior and Informed Consent
GRIF	Guyana REDD+ Investment Fund
JCN	Joint Concept Note
LCDS	Low Carbon Development Strategy
MOU	Memorandum of Understanding
OAS	Organisation of American States
REDD+	Reducing Emissions from Deforestation and Degradation- Plus
RPP	Readiness Preparation Proposal
FPP	Forrest Peoples Programme
UNEP	United Nations Environmental Programme
UNFAO	United Nations Food and Agricultural Organization
UNFCCC	United Nations Framework Climate Change Convention
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous People

## Chapter 1

### **Impetus for Thesis and a General Overview of the Contemporary Legal and Political Framework Governing Amerindian Rights in Guyana**

Indigenous rights in Guyana, as elsewhere, are not fully recognized or protected. This thesis concerns Amerindian rights in Guyana and it arises from Guyana's pioneering REDD+ model, a model of forestry preservation and sustainable development Guyana is developing in partnership with Norway. Launched in June 2009, the model places almost all of the country's pristine rainforest, consisting of some 15 million hectares, under long-term protection,<sup>1</sup> in return for monetary incentives which, the government boasts, will be used to move the Guyanese economy along a low carbon development trajectory.<sup>2</sup>

This forestry preservation and sustainable development model is part of the global climate change mitigation scheme: Reducing Emissions from Deforestation and Degradation plus (REDD+). REDD+ is a new mitigation strategy being negotiated under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC). REDD+ is a series of initiatives focused on/in developing countries seeking to diminish carbon dioxide emissions caused by deforestation and degradation, processes recognized as being one of the leading causes of climate change.<sup>3</sup> It aims to dramatically reduce these emissions by creating an incentive mechanism that will pay developing countries to halt destructive processes that lead to deforestation and degradation.<sup>4</sup>

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<sup>1</sup>A *Low Carbon Development Strategy: Transforming Guyana's Economy while Combating Climate Change* (Republic of Guyana: Office of the President, 2010) at 7, online: LCDS< <http://www.lcds.gov.gy/>>. This includes investing in educational and infrastructural services, the construction of hydroelectric dams, and promoting large scale agriculture.

<sup>2</sup> *Ibid.* at 8, 25-29.

<sup>3</sup> B. Metz *et al*, *Mitigation of Climate Change: Contribution of the Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (United Kingdom and New York: Cambridge University Press, 2007) at 543-545; Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge: HM Treasury/Cabinet Office, 2007) at 216.

<sup>4</sup> Charlie Parker *et al*, *The Little REDD Book: A guide to governmental and non-governmental proposals to reduce emissions from deforestation and degradation* (United Kingdom: Global Canopy Programme, 2008) at 4, 22, 33-48.



Guyana's REDD+ model has direct implications for the country's indigenous people, since most REDD+ related activities are scheduled to take place within regions Amerindians have historically occupied and used. Although REDD+ is marketed as a scheme that could reduce rural poverty and promote biodiversity conservation,<sup>5</sup> it is also recognized as a scheme that could potentially harm forest-dependent indigenous peoples if their rights are not properly safeguarded in the scheme's design and implementation.<sup>6</sup> REDD+ is being negotiated and promoted in a context where, while they are highly regarded as stewards of vast portions of the world's forest, indigenous peoples residing in the forest continue to face a lack of secure legal safeguards over their forest lands and resources, as well as other procedural rights such as rights to effective participation in policy decision making and the right to free, prior and informed consent (FPIC).<sup>7</sup> The lack of secure land tenure and related rights has made indigenous peoples vulnerable at the hands of both state and non-state actors. Under forest governance regimes that favour the interests of elites and commercial companies, indigenous peoples have been exposed to multiple forms of abuse and exploitation resulting from large-scale development projects, conservation schemes, and REDD+ type projects under the Kyoto Protocol's Clean Development Mechanism and Payments for Environmental Service Projects. The prospect of REDD+ thus raises concerns that rural communities that are exercising stewardship over forests could be pushed aside by local elites, private investors, or others seeking to position themselves to receive new revenue flows available for protecting forests.<sup>8</sup>

Guyana's REDD+ model is developing at a time when Amerindians are still struggling to overcome centuries of colonization that reduced them to an inferior class of citizens, denied them legal ownership of their lands and territories, and undermined their sovereignty as peoples. European colonization has been followed by decades of post-colonial social neglect, human rights abuses, and other exploitations that have synergistically operated to make Amerindians the

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<sup>5</sup> Johan Eliasch, *Climate Change, Financing Global Forest: The Eliasch Review* (United Kingdom: Stationary Office LTD, 2008) at 7-11.

<sup>6</sup> Lorenzo Cotula & James Mayers, *Tenure in REDD: Start-point or afterthought?* (United Kingdom: International Institute for Environment and Development, 2009) at 3.

<sup>7</sup> United Nations, *State of the World Indigenous Peoples* (New York: United Nations, 2009) at 84-93.

<sup>8</sup> *Ibid.*

most marginalized and vulnerable peoples in Guyana.<sup>9</sup> Despite legal and political reforms realized in recent years, particularly in the area of constitutional reforms (mostly brought about by the advocacy of a vibrant Amerindians rights movement and not necessarily the initiative of the state), Amerindians still lack the protection of inalienable rights necessary for their protection and survival as indigenous peoples. They lack, *inter alia*, full rights to own and control their ancestral lands, territories, and resources; rights to participation; and rights to FPIC. Developing REDD+ in this context could have significant negative consequences for Amerindians, which underscores the importance of why these activities need to safeguard indigenous rights in the development process.

The treatment of Amerindians in the design and implementation of the country's REDD+ model to date leaves much to be desired in terms of recognition and protection of important human rights. The government is adopting a "business-as-usual" approach to developing this model. Its current focus is on developing sophisticated and complex carbon-accounting and -monitoring systems, constructing a high-powered hydroelectric dam, and promoting overall economic development, while lesser attention is being directed at adequately safeguarding Amerindian rights.

Consequently, this thesis arises out of concern for Amerindian rights. It brings the current treatment of indigenous peoples to the attention of policy makers and those concerned about indigenous rights, in an effort to advocate for reforms.

### ***Background Information on Guyana***

The Co-operative Republic of Guyana is a small country located on the Northern Atlantic coast of South America. It is bordered to the east by Suriname, to the west by Venezuela, and to the south by Brazil. The most recent census estimates its population at 751,223,<sup>10</sup> of which 68,675 or 9.2 percent are indigenous peoples.<sup>11</sup> It is a multiparty democracy with a legal system

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<sup>9</sup> *The Guyana Poverty Reduction Strategy Paper* (Washington D.C.: International Monetary Fund, 2002) at 7; *Sector Facility Profile: Guyana (Project No. GY-0070)* (Washington D.C.: Inter-American Development Bank, 2003) at para. 1.6; *Population & Housing Census 2002 - Guyana National Report* (Georgetown: Bureau of Statistics, 2002) at 18.

<sup>10</sup> *Population & Housing Census 2002, Ibid.* at 18.

<sup>11</sup> *Ibid.* at 27-28.

that is mostly common law, with a few remnants of Roman Dutch law.<sup>12</sup> Geographically, Guyana is linked to South America, but culturally, economically, and politically, it is linked to the Anglophone Caribbean. It is the only English-speaking country in South America.

Guyana is the product of European colonization of the New World. Though sighted by Columbus on his third voyage in 1498, it was the Dutch who managed to gain a foothold on its wild coast in the 17<sup>th</sup> century. Dutch settlers established various trading posts in the interior regions, and later cotton and sugar plantations on the coast, which led to the importation of African slaves to the region.<sup>13</sup> In 1814, the Dutch ceded Guyana to the British, who asserted sovereignty over the whole of the Guiana territory, and ruled the colony until Guyana achieved independence in 1966.<sup>14</sup> Within the period 1966–2010, Guyana has experimented with two political ideologies: Cooperative Socialism under Burnham's regime in the 1970s and 1980s, and a return to a free market enterprise in the late 1980s.<sup>15</sup>

Once referred to as the breadbasket of the Caribbean,<sup>16</sup> Guyana today is one of the poorest and most corrupt countries in the southern hemisphere, with a GDP per capita of US\$2,660 before taxes per annum.<sup>17</sup> Corruption is perceived as widespread; Guyana ranks 116<sup>th</sup> out of 178 countries in Transparency International's Corruption Perceptions Index for 2010.<sup>18</sup> There is extensive corruption at every level of law enforcement and government.<sup>19</sup> Guyana's colonial and post-colonial political climate is underscored by political turbulence and racial polarization between its two major ethnic groups: Africans and East Indians.<sup>20</sup>

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<sup>12</sup> See the *Civil Law Act of Guyana*, Cap 6:01.

<sup>13</sup> Marcus Colchester, *Guyana, Fragile Frontiers: Loggers, Miners and Forest Peoples* (Great Britain: Latin America Bureau, 1997) at 10.

<sup>14</sup> *The Guyana Independence Act*, 1966 (c, 14).

<sup>15</sup> Kempe R. Hope, *Guyana: Politics and Development in an Emergent Socialist State* (Oakville: Mosaic Press, 1985) at 81-93; Philippe Egoumè-Bossogo *et al*, *Experience with Macroeconomic Stabilisation, Structural Adjustment, and Poverty Reduction* (Washington D.C.: International Monetary Fund, 2003) at 1-3.

<sup>16</sup> Chaitram Singh, *Guyana: Politics in a Plantation Society* (United States: Praeger Publishers, 1988) at 1.

<sup>17</sup> World Bank, *Data for Guyana*, online: <http://data.worldbank.org/country/guyana>

<sup>18</sup> Transparency International, *Corruption Perception Index Results*, online: Transparency International [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

<sup>19</sup> OSAC. *Guyana: Crime and Safety Report*, online: OSAC <https://www.osac.gov>

<sup>20</sup> Reynold Burrowes, *The Wild Coast: An Account of Politics in Guyana* (Cambridge, Massachusetts: Schenkman, 1984); Thomas J. Spinner, Jr., *A Political and Social History of Guyana, 1945-1983* (London: Westview Press Inc., 1984); Roy Arthur Glasgow, *Guyana: Race and Politics Among Africans and East Indians* (Hague, Netherlands: Martinus Nijhoff, 1970); Chaitram Singh, *supra* note 16.

## *Guyana's Forest*

During the colonial era, development was mostly concentrated in the coastal region of Guyana, where most of the country's arable land is found and where sugar cane cultivation formed the major economic activity of the colony. Mining, which started in the interior following the gold finds of the 1800s, was mostly done on a small scale. Logging was only carried out in the more accessible regions of the forest and was done in a very restrictive manner. As a result, large-scale resource exploitation and development never reached the deep interior.<sup>21</sup> The vast forested interior, consisting of some 18 million hectares of tropical forest,<sup>22</sup> remained virtually undisturbed. Following independence in 1966, Forbes Burnham came to presidential power and began experimenting with socialist ideologies, which led the country into economic morass as a result of economic mismanagement and severe political difficulties.<sup>23</sup> Economic stagnation under his regime led to the decline of the forestry and mining industries throughout the 1980s.<sup>24</sup> This resulted in the country retaining almost all of its forest cover into the 21<sup>st</sup> century.

In the late 1980s, following a return to democracy, the government's attention shifted to the forests. Under pressure from major financial institutions such as the World Bank and the International Monetary Fund (IMF) to carry out structural adjustments, the government began exploiting the forest for economic development.<sup>25</sup> This period onwards witnessed the distribution of mining and logging concessions, licences, and prospects, and added incentives such as tax exemptions, to both local and multinational corporations, resulting in a huge influx of miners and loggers moving into the interior.<sup>26</sup> During this period, Guyana witnessed its highest level of

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<sup>21</sup> Colchester, *Fragile Frontiers*, *supra* note 13 at 96.

<sup>22</sup> *Guyana: Readiness Preparation Proposal* (Georgetown: Guyana Forestry Commission, 2010) at 6.

<sup>23</sup> Egoumè-Bossogo *et al*, *supra* note 15 at 2-3; *The Guyana Poverty Reduction Strategy Paper*, *supra* note 9 at 7; John Gafar, *Guyana: From State Control to Free Markets* (New York: Nova Science Publishers, 2003) at 10-12; Clive Thomas, "Lessons from Experience: Structural Adjustment and Poverty in Guyana" (1993) 42:4 *Social and Economic Studies* 133-184 at 135; John Gafar, "Growth, Inequality and Poverty in Selected Caribbean and Latin American Countries, with emphasis on Guyana" (1998) 30 *Journal of Latin American Studies* 591-617 at 603.

<sup>24</sup> *Ibid*.

<sup>25</sup> Patrick Williams, "The IMF/World Bank Structural Adjustment Program and its Consequences for Guyana's Environment: A Case Study of the Forestry and Mining Sectors" (Presented at Carnegie Mellon University, 15 January 2003) [unpublished].

<sup>26</sup> *Ibid*.

deforestation and environmental degradation under weak institutional and regulatory mechanisms.<sup>27</sup>

However, according to the United Nations Food and Agriculture Organization (UNFAO), these activities had no major impact on the forest, at least when compared to deforestation activities of other developing countries such as Indonesia and Brazil. According to UNFAO figures, Guyana's deforestation rate was negligible between 1990 and 2000 and non-existent between 2000 and 2005. It estimates the current rate to be 0.1–0.3 percent a year.<sup>28</sup> Thus, Guyana still has one of the most pristine rainforests in the tropical south, making the country an ideal storehouse for carbon dioxide greenhouse gases and thus very attractive for REDD+ projects.

### *The Amerindians of Guyana*

Amerindians are Guyana's indigenous peoples. They descend from the original inhabitants of the Guyana shield and have legal recognition in the country. The preamble of the 1980 Guyana Constitution with 2001 reforms states, "WE, THE GUYANESE PEOPLE,... Value the special place in our nation of the Indigenous Peoples and recognize their right as citizens to land and security and to their promulgation of policies for their communities,"<sup>29</sup> Amerindians comprise 9 percent of Guyana's population (70,000 people in total) and include the the Warrau, Carib, Arawak, Akawaio, Patamona, Arekuna, Makushi, Wapishana and Wai Wai peoples. Remnant elements of other peoples, including the Trio, Taruma, and Atorad, whose numbers have been reduced by wars, epidemics, and migrations, are also found in some settlements.<sup>30</sup> Amerindians live in scattered communities across the forested and savannah regions of the country's interior, and are the majority population in these regions.

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<sup>27</sup> *Ibid.*

<sup>28</sup> UN Food and Agriculture Organisation. Country profile on forest disturbances statistics— Global Forest Resources Assessment 2005, online: FAO <http://www.fao.org>.

<sup>29</sup> Constitution of the Co-operative Republic of Guyana, Chapter 1:01 (Act No.6 of 2001).

<sup>30</sup> Marcus Colchester, Jean La Rose & Kid James, *Mining in Guyana: Exploring Indigenous Perspective on Engagement and Consultation within the Mining Sector in Latin America and the Caribbean* ( Ottawa: North South Institute, 2002) at 5; See also, Lal Balkaran, *Dictionary of the Guyanese Amerindians and other South American Native Terms: An A-Z Guide to their Anthropology, Cosmology, Culture, Exploration, History, Geography, Legend, Folklore and Myth* (Ontario: LBA Publication, 2002);<sup>30</sup> Janette Bulkan & Arif Bulkan, "These Forest Have Always Been Ours": Official and Amerindian Discourse on Guyana's Forest Estate" in Maximilian C. Forte, ed., *Indigenous Resurgence in the Contemporary Caribbean* (New York: Peter Lang Publishing Inc., 2006) at 137-136.

Similar to most indigenous peoples worldwide, Amerindians share a common history of dispossession and disempowerment resulting from European colonization. What began as a relationship based upon trading, friendship supported by treaties of alliances, sovereignty, and gift-giving under Dutch colonization later transformed into control, domination, and dispossession with the arrival of the British in the early 19<sup>th</sup> century.

The Dutch were the first Europeans to establish a presence on the Guyana shield. They came initially to trade with the Indians, but eventually settled, thereafter establishing huge sugarcane enclaves on the coast and importing African slaves for their work force.<sup>31</sup> A relationship based upon friendship and treaties of alliances existed between the Dutch and the Indians.<sup>32</sup> During their rule, the Dutch policy of dealings with indigenous people involved (1) treaties of alliance and friendship; (2) annual or triennial presents for services rendered; (3) appointment of postholders (*uitleggers*), who “were appointed and sent to live among them in order to gain their goodwill and to collect and lead them in slave hunting expeditions against their enemies, the Spaniards, and later against the runaway negroes;”<sup>31</sup> and, (4) as decided by the Court of Policy in 1750, strict non-interference in indigenous affairs unless the life of the colony was threatened.<sup>33</sup>

In 1814, Guyana was formally ceded by the Dutch to Great Britain. Although the British colonial regime could not claim rights either of sovereignty or land ownership based on conquest, cession by treaty, or papal bull, it nonetheless asserted sovereignty over all of Guyana.<sup>34</sup> In the early days of the British rule, it was recognized that the indigenous inhabitants had a pivotal contribution to make in the colony, in terms of assisting in the recapturing of runaway African slaves, and providing additional security in the event of war. However, throughout the 19<sup>th</sup> century, the viability of the colony, abolition of slavery, and changes in export commodities decreased British need for a formal relationship with indigenous peoples.

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<sup>31</sup> Mary Menezes, *British Policy towards the Amerindians in British Guiana 1803-1873* (Oxford: Clarendon Press, 1977) at 46.

<sup>32</sup> *Ibid.* at 47-51.

<sup>33</sup> *Ibid.*

<sup>34</sup> Colchester, *Fragile Frontiers*, *supra* note 13 at 129. Note that there is no evidence in Guyana to the effect that Amerindians had voluntarily alienated their lands by virtue of treaty or any other agreement to the British or their predecessors, the Dutch.

This led the British to formulate a policy of wardship, integration, and assimilation in the 19<sup>th</sup> century. Amerindians came to be seen as a race in need of “protection” until they “reached a standard of civilization” that enabled them to “take their place in the general life of the colony.”<sup>35</sup> Laws premised upon this paternalistic notion were enacted to achieve this goal.

Under legislation such as the Indians (Captains and Constables) Ordinance of 1896, the Aboriginal Indians (Intoxicating Liquors) Ordinance of 1908,<sup>36</sup> and the Aboriginal Indians Protection Ordinance of 1902<sup>37</sup> (which was repealed in 1910 but had been the first attempt to develop a cohesive legislation to deal with the indigenous citizenry),<sup>38</sup> Amerindians were reduced to an inferior class of citizenship and essentially made into wards of the state, having the equivalent status of children and infidels.<sup>39</sup> They were denied the right to consume alcohol, and were formally placed on reservations established under the 1910 legislation. Colonial authorities assumed extensive powers of interference in all aspects of indigenous life and appointed a Protector of Indians to act as a guardian for the Amerindians.<sup>40</sup> According to British colonial official P.S. Peberdy, “the whole object of protection was to keep the protected group away from temptations, bad influences, and from exploitation, until the authorities are satisfied that sufficient advancement has been made, to warrant protection unnecessary.”<sup>41</sup> Those reservations that were established did not constitute titled lands owned by the Amerindians, but were supposedly “safe zones,” which could be, and were, made non-existent as easily as they were created.<sup>42</sup>

Guyana became an independent state in 1966. While independence meant liberation for other Guyanese, such as the Africans and East Indians who came to Guyana under conditions of extreme servitude, there was no liberation for Amerindians. The independent governments

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<sup>35</sup> Tony James, “Indigenous Peoples Land Rights: Past, Present and Future” (Paper presented to the Indigenous Rights in the Commonwealth Caribbean and Americas Regional Expert Meeting, 23-25 June 2003) [unpublished].

<sup>36</sup> *Aboriginal Indian (Intoxicating Liquor) Ordinance*, No.10 of 1908.

<sup>37</sup> *Aboriginal Indian Protection Ordinance*, No.21 of 1902.

<sup>38</sup> *Aboriginal Indian Protection Ordinance*, No.28 of 1910.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Peberdy P.S., *Report of a Survey on Amerindian Affairs in the Remote Interior: With additional notes on coastland population groups of Amerindian origin* (Government of British Guyana, 1948) at 38.

<sup>42</sup> Fergus Mackay, “Indigenous Peoples’ Rights in the Commonwealth Caribbean” (Paper presented to the Indigenous Rights in the Commonwealth Caribbean and Americas Regional Expert Meeting 23-25 June 2003) [unpublished].

continued to exercise paternalistic control over Amerindians. According to all economic indices, Amerindians are the poorest and most disadvantaged sector of the population. While indigenous peoples comprise 9 percent of the population, they are over 17 percent of the poor in Guyana.<sup>43</sup> The Household Income and Expenditure Survey last compiled in 1992–1993 revealed that Amerindians, who were concentrated in interior regions, had the highest incidence of poverty at 56 percent, when compared to the African and mixed groups at 28 percent and East Indians at 22 percent.<sup>44</sup> A decade later, this had not changed. As reported by the Inter-American Development Bank in 2003, poverty among indigenous peoples had substantially increased and intensified.<sup>45</sup> A 2004 World Bank report states unequivocally that indigenous peoples are “disproportionately disadvantaged socially and economically.”<sup>46</sup> This situation persists despite the insistence of the current administration that it has continuously improved the lives and livelihoods of Indigenous groups by increasing educational, medical, and other social services to several communities as it seeks to decrease the gap between those living in interior regions and those living on the coast.

#### *Amerindian Governance Structure*

Guyanese Amerindians exercise a limited form of self-governance. The system under which this occurs dates back to the colonial era where communities were allowed to elect their own chiefs/owls to represent their interests with the colonial authorities.<sup>47</sup> Today, under Guyanese legislation, each community elects a body responsible for administering the affairs of their communities. An Amerindian community that holds a legal title to lands granted by the state is termed a “village council.” Where the Amerindian community occupies state lands without a legal title, it is termed a “community council.” Village/community councils are headed

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<sup>43</sup> *Sector Facility Profile: Guyana (Project No. GY-0070)*, *supra* note 9 at para. 1.6.

<sup>44</sup> Guyana Household Income and Expenditure Survey 1992-1993 cited in *The Guyana Poverty Reduction Strategy Paper*, *supra* note 9.

<sup>45</sup> *Sector Facility Profile: Guyana (Project No. GY-0070)*, *supra* note 9.

<sup>46</sup> *Guyana: Education for All, Fast Track Initiative Program, Amerindian Peoples’ Strategy* (Washington D.C. World Bank, 2004), at 9. Available at: [http://www.wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000012009\\_20041006102054](http://www.wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20041006102054).

<sup>47</sup> Neil Whitehead, *Lords of the Tiger Spirit: A History of the Caribs in Colonial Venezuela and Guyana 1498-1820* (Dordrecht: Foris Publications, 1988).



by a Toshaos (village captains) and councillors whose numbers vary according to the size of the village or community.<sup>48</sup>

The Amerindian legislation is silent on the functions and powers of the community council, although the functions and powers of a village council are set out in Section 13(1) of the *Amerindian Act*. These roles include the following: providing advice and strategic direction to the village; providing for the planning and development of the village; managing and regulating the use and occupation of village lands; promoting the sustainable use, protection, and conservation of village lands and the resources on those lands; ensuring that places and artifacts located within village lands that hold sacred or cultural values to the village are protected and cared for; protecting and preserving the village's intellectual property and traditional knowledge; ensuring that proper accounts and financial records are properly kept; and levying taxes on residents.

In exercising its functions, a village council is empowered to make rules that regulate, *inter alia*, qualifications of residency; occupation and use of village lands; the management, use, preservation, protection, and conservation of village lands and resources or any part thereof; protection and sustainable management of wildlife including restrictions on hunting, fishing, trapping, poisoning, setting fires, and other interference with wildlife; and, development and regulation of agriculture.

#### *The National Toshaos Council*

In addition to individual village councils, the Amerindian governance structure also includes the National Toshaos Council (NTC). The NTC is a body corporate comprising all Toshaos.<sup>49</sup> It is regarded as the sole legitimate national body that represents all Amerindian communities, although lately, its independence from the ruling political party has come under

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<sup>48</sup> *Amerindian Act 2006*, Cap 29:01 sec.11(1), Available at <http://legalaffairs.gov.gy>. Note that while the Amerindian Act was passed on February 16, 2006 and assented to by the President on March 14, 2006, it was only brought into force until 2010. See Christophor Ram, "Letter to the Editor: The Amerindian Act 2006 has not yet been brought into force" *Stabroek News*(8 September 2010), online: Stabroek News<<http://www.stabroeknews.com/2010/opinion/letters/09/08/the-amerindian-act-2006-has-not-yet-been-brought-into-force/>>; Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2011 – Guyana*, online: Refworld< <http://www.unhcr.org/refworld/country,,MRGI,,GUY,,4e16d37155,0.html>>.

<sup>49</sup> *Ibid.* at sec. 38.

doubt.<sup>50</sup> The functions of the National Toshias Council include the ability to do the following: nominate—in accordance with Article 212 S(2) of the constitution—persons to the Indigenous Peoples Commission; at the request of the Minister, investigate allegations of improper conduct by any Toshias or councillor or within any Village Council or District Council; and, promote good governance in villages, including by investigating matters as requested by a village and making recommendations, provided that the National Toshias Council may not investigate any matter that has been referred to the Minister and must ensure that any person involved in the investigation is given a reasonable opportunity to be heard.

### *Legal Framework Governing Amerindians in Guyana*

In Guyana, Amerindian rights are addressed by way of a number of sources of law, including the constitution, international law, the *Amerindian Act*, the *Mining Act*,<sup>51</sup> the *State Lands Act*,<sup>52</sup> and the *Forest Act*.<sup>53</sup> For the purpose of this thesis, only the constitution, international law, and the *Amerindian Act* will be examined in detail, since they deal extensively with Amerindian rights.

### *The Constitution*

Prior to 2001, Guyana's constitution was silent on Amerindian rights. In 2003, the constitution was amended to include a specific section that guarantees Amerindians rights to their languages, cultures, and way of life. The exact language found in the fundamental rights sections states, "Indigenous peoples shall have the right to the protection, preservation and promulgation of their languages, cultural heritage and way of life."<sup>54</sup> This guarantee was long overdue, given the historical injustices and present realities faced by Guyana's Amerindians. However, notably absent from this section is any reference to land—to which the well-being, way of life, and culture of indigenous peoples are intimately bound. It is likely that a court applying a purposive approach could interpret this provision as guaranteeing Amerindians' rights

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<sup>50</sup> Marcus Colchester & Jean La Rose, *Our Land, Our Future: Promoting Indigenous Participation and Rights in Mining, Climate Change and other Natural Resource Decision-Making in Guyana* (Ottawa: North-South Institute, 2010) at 23.

<sup>51</sup> *Mining Act 1989*, Cap 65:01.

<sup>52</sup> *State Lands Act 1903*, Cap 62:01.

<sup>53</sup> *Forest Act*, No. 6 of 2009.

<sup>54</sup> *Constitution (Amendment) (No.2) Act*, No. 10 of 2003, Article 149G.

to their ancestral lands; however, it is unlikely that this interpretation will happen in the near future. The courts in Guyana have been particularly silent on matters of indigenous rights. For example, the first major lawsuit filed by Amerindians, seeking the Court's determination of whether native title exists in Guyana, has been pending in the High Court since 1998.<sup>55</sup>

### *International Law*

Amerindians have rights under international law that stem from international instruments ratified and endorsed by Guyana, including the International Covenant on Civil and Political Rights (1966) (ICCPR),<sup>56</sup> the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR),<sup>57</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD),<sup>58</sup> the Convention on the Rights of the Child (1989),<sup>59</sup> the American Declaration on the Rights and Duties of Man (1948),<sup>60</sup> and the Convention on Biological Diversity (1992) (CDB).<sup>61</sup> Article 154A of the reformed constitution stipulates that all organs of the Guyanese state shall respect and uphold human rights set out in ratified international instruments.<sup>62</sup> These rights are enforceable, without prejudice to other applicable legal remedies, through application to the Human Rights Commission, a Constitutional Commission established by law in 2001. Scholars argue that by incorporating these international instruments directly into the constitution, they have been incorporated into the domestic regime and arguably have achieved the status of domestic law.<sup>63</sup>

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<sup>55</sup>*Van Mendason et al v Attorney General of Guyana*, Action #1114-W of 1998.

<sup>56</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, (entered into force 23 March 1976).

<sup>57</sup> General Assembly Resolution 2200A (XXI) 16 December 1966, U.N.T.S. vol. 993, 3 (entered into force 3 January, 1976).

<sup>58</sup> *Convention on the Elimination of All Forms of Racial Discrimination* 660 U.N.T.S. 195 (entered into Force Jan. 4, 1969).

<sup>59</sup> *Convention on the Rights of the Child*, G.A. Res. 44/25, UN GAOR, 44th. Session, U.N. Doc. A/RES/44/25 (1989).

<sup>60</sup> Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948.

<sup>61</sup> (5 June 1992) 31 ILM 818.

<sup>62</sup> Constitution of Guyana, *supra* note 29, at sec. 154A (1) and Fourth Schedule.

<sup>63</sup> Arif Bulkan, "Democracy in Disguise: Assessing the Reforms to the Fundamental Rights Provisions in Guyana" (2002) *Georgia Journal of International and Comparative Law*, 612.

These instruments affirm that indigenous peoples have rights to their ancestral lands, territories, and resources,<sup>64</sup> self-determination,<sup>65</sup> culture,<sup>66</sup> and Free, Prior and Informed Consent (FPIC),<sup>67</sup> among other rights. They also impose obligations on Guyana to recognize, respect, and guarantee indigenous peoples' rights. Article 27 of the ICCPR protects minority rights. It states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." This article protects linguistic, cultural and religious rights and, in the case of Indigenous peoples, includes, among others, land and resource, subsistence and participation rights.<sup>68</sup> Similar language is found in article 30 of the UN Convention on the Rights of the Child. article 30 reads: "In those states in which ethnic, linguistic or religious minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right in community with other members of the group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language." In its 1997 General Recommendation, the CERD called upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>69</sup> CERD's 1997 General Recommendation called upon state-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and

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<sup>64</sup> *General Recommendation XXIII (51) concerning Indigenous Peoples Adopted at the Committee's 1235th meeting, on 18 August 1997*. UN Doc. CERD/C/51/Misc.13/Rev.4.;

<sup>65</sup> Art. 1 *International Covenant on Economic, Social and Cultural Rights*, *supra* note 57.

<sup>66</sup> Art 27 *International Covenant on Civil and Political Rights*, *supra* note 56.

<sup>67</sup> Arts. 18 and 19 'Declaration on the Rights of Indigenous Peoples' GA Res. 61/295, UN GAOR, 61<sup>st</sup> session, Supp. No.53. UN Doc A/Res/ 61/295 (13 Sept 2007).

<sup>68</sup> Human Right Committee, *General Comment No. 23 (50) (art. 27)*, adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5. at 3; Bernard Ominayak, *Chief of the Lubicon Lake Band v. Canada*, Report of the Human Rights Committee, 45 UN GAOR Supp. (No.43), UN Doc. A/45/40 , vol. 2 (1990), 1; *Kitok v. Sweden*, Report of the Human Rights Committee, 43 UN GAOR Supp. (No.40) UN Doc. A/43/40; *Lovelace v. Canada* (No. 24/1977) Report of the Human Rights Committee, 36 UN GAOR Supp. (No. 40) 166, UN Doc. A/36/40 (1981).

<sup>69</sup> *CERD General Recommendation XXIII (51)*, *supra* note 64.

interests are taken without their informed consent.”<sup>70</sup> In Guyana’s case, there is an added obligation to secure the rights guaranteed in these instruments. A number of international treaties and conventions that are relevant to indigenous peoples are directly incorporated into the constitution.

### *The Amerindian Act*

Until 2006, the *Amerindian Act 1976*<sup>71</sup> was a relic of Guyana’s colonial past, one that was paternalistic in outlook. This legislation controlled every aspect of Amerindian life. It empowered the Minister of Amerindian Affairs to take indigenous children into custody for purposes of their education, welfare, or apprenticeship in the service of others (Sec. 40(2)(c)(d)); to relocate Indigenous communities to any region of Guyana (Sec. 40(2)(a)); to prohibit cultural and religious activities that the Minister believed to be harmful (Sec. 40 (2)(f)); and to require that any non-Amerindian wishing to visit indigenous lands, even if invited by the community, receive the permission of the Minister of Amerindian Affairs under penalty of fine and imprisonment (Sec. 5). In addition, the legislation imposed a number of restrictions on Amerindian property holdings and also authorized the Minister to, among others thing, take, sell, or otherwise dispose of Indigenous property for “purposes of its care, management or protection” (Sec. 12(1)(a)).

With pressure from the international community and a vibrant indigenous rights movement, the government was forced to reform this outdated and paternalistic legislation, which was deemed to be an “old style statute setting out colonial structure of indirect rule.”<sup>72</sup> Consequently, Guyana’s parliament passed a revised *Amerindian Act 2006* in 2006, which came into force in 2010. The stated aim of this legislation is “to provide for the recognition and protection of the collective rights of Amerindian Villages and Communities, the granting of land to Amerindian Villages and Communities and the promotion of good governance within Amerindian Villages and Communities.”<sup>73</sup> While the legislation did not embrace a clean break from the 1976 *Amerindian Act*, it nevertheless marked a significant departure. Overall, the act

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<sup>70</sup>*Ibid.*

<sup>71</sup> *Amerindian Act 1976*, Cap. 29:01.

<sup>72</sup> D. Sanders, *Indigenous Peoples in Guyana; A Report for the World Bank* (Washington D.C.: World Bank, 1995) at 6.

<sup>73</sup> *Amerindian Act*, *supra* note 48.

significantly reduced the powers of the Minister of Amerindians to interfere in almost every aspect of Amerindian lives and regulation of their communities. Notably in the areas of Amerindian identity, collective decision making, and overall accountability, significant reforms were implemented, thus conferring on Amerindian communities (often represented by village council) greater powers to govern their individual communities. Village councils now have the power to issue house lots in their individual communities, lease lands to non-Amerindians, make rules and bylaws for the smooth operation of the community, and act as arbiters in dispute resolution among residents.

While these developments represent a major milestone in Guyana's history as it relates to Amerindian people, nonetheless, this legislation still contains a number of major deficiencies and falls short of prevailing international norms on indigenous peoples' rights. One of the major defects with the legislation is its failure to explicitly recognize that indigenous peoples have inherent rights to land; currently, rights to land are granted by the state. Under the legislation, the Minister of Amerindian Affairs is vested with the sole authority and unfettered discretion to make decisions regarding the granting of land titles and extensions to communities.<sup>74</sup> The legislation also restricts communities from applying for titles based on residency and population size, and, without providing any reasonable justification, it excludes Amerindians from title to any subterranean waters, rivers, and creeks, and other bodies of water and subsoil minerals.<sup>75</sup>

Further, the act draws a distinction between titled and untitled communities for the purpose of holding and exercising rights. The state recognizes only those village councils arising from communities holding title issued by the state; only titled communities have the right to give or withhold their consent to small- and medium-scale activities, logging, and the establishment of protected areas on their village lands.<sup>76</sup> Untitled communities living on so-called "state land," on the other hand, have no such rights; they hold traditional rights. Traditional rights as defined under the legislation means "any subsistence right or privilege, in existence at the date of the

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<sup>74</sup> *Ibid.* at secs. 59-64.

<sup>75</sup> *Ibid.* at sec.53; Section 6 of the *1989 Mining Act Cap 65:0* provides that "all minerals within the lands of Guyana, shall vest in the State." Note also that control of these resources or at least part of them is necessary in Guyana's context, since without them Amerindian will continuously be exposed to devastating water pollution and environmental degradation that are caused by unregulated mining in their territories.

<sup>76</sup> *Amerindian Act, supra* note 48 sec.2.

commencement of this Act, which is owned legally or by custom by an Amerindian Village or Amerindian Community and which is exercised sustainably in accordance with the spiritual relationship which the Amerindian Village or Amerindian Community has with the land, but it does not include a traditional mining privilege.”<sup>77</sup> However, it unclear what will constitute traditional rights in light of new forestry legislation. Under the 2009 *Forestry Act*, traditional Amerindian rights to state forest have been reduced to “sustainable non-commercial practices.”<sup>78</sup> However, the legislation does not define “sustainable non-commercial practices”.

Finally, Amerindian rights to be consulted, to participate, and to consent to activities affecting their lands and resources are not adequately recognized or guaranteed under the legislation. For example, Section 48(1)(g) of the *Amerindian Act* requires indigenous communities to give consent for mining activities on titled lands. This right, however, is only limited to small- and medium-scale mining. Section 50(1)(a) provides that, should a community refuse consent in the case of large-scale mining, its decision may be over-turned “if the Minister with responsibility for mining and the Minister of Amerindian Affairs declare that the mining activities are in the public interest.” Similarly, under section 58 of the legislation, consent is required in relation to the establishment of protected areas on titled lands. With regard to the traditional lands of untitled communities or traditional lands contiguous to titled lands, consent is required in relation to any “alteration or abrogation of any traditional right over such land.” Since Guyanese law does not recognize ownership rights over traditional lands, but merely limited usufruct rights, the “traditional rights” protected by this section do not include ownership rights. Section 58 thus fails to provide full protection for unrecognized communities.

#### *Rejection of the Amerindian Act by the CERD*

The CERD Committee found that many provisions in the *Amerindian Act* are incompatible with the CERD convention. In its 2006 concluding observation on Guyana, commenting on sections 59-64 of the *Amerindian Act*, the committee stated the following:

The Committee is deeply concerned about the lack of legal recognition to the rights of ownership and possession of indigenous communities over lands

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<sup>77</sup> *Ibid.* at sec. 2(b).

<sup>78</sup> *Forest Act*, *supra* note 53 sec. 2 (e).

which they traditionally occupy, and about Guyana's practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy.<sup>79</sup>

The committee urged the government to recognize and protect the rights of indigenous communities to own, develop, and control the lands that they traditionally occupy, including subsoil resources, and to safeguard their rights to exclusively use lands to which they have traditionally had access for subsistence. The committee also urged Guyana to establish adequate procedures, and to define clear justice criteria to resolve land claims by indigenous communities within the domestic justice system while taking due account of relevant indigenous customary laws.<sup>80</sup> Thus far, these recommendations have not been acted upon.

#### *Amerindian Struggle for Land*

Land is the single most contentious issue between Amerindians and the Guyanese government.<sup>81</sup> Since Guyana's independence, Amerindians have been demanding legal recognition to their ancestral lands, territories, and resources.<sup>82</sup> Although Amerindian rights to their ancestral lands is guaranteed in the country's independence agreement,<sup>83</sup> the government's

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<sup>79</sup> CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana (21 March 2006), 68th sess. UN Doc CERD/C/GUY/CO/14, at para. 16.

<sup>80</sup> *Ibid.*

<sup>81</sup> Colchester & La Rose, *supra* note 50 at 9.

<sup>82</sup> Note that in 1962, a petition signed by 26 Amerindian Chiefs was submitted to the Queen of the United Kingdom which read: The humble petition of the chiefs of the Amerindian villages of British Guiana respectfully sheweth: Your petitioners are the Chiefs of the below mentioned villages and represent the Amerindians who are descendants of the original inhabitants of this country. Our peoples number 30,000 and live in villages scattered over approximately 68,000 square miles of British Guiana's total land area. Our people have lived peacefully in the forests and savannahs of British Guiana and have enjoyed protection of Your Majesty's Government for over 182 years. Your Petitioners have heard that there is a possibility of Independence being granted soon and they are afraid of what will happen after Independence when Your Majesty's protection will be withdrawn. Your Petitioners especially fear that their rights will then be abrogated and ignored and the lands on which the Amerindians have lived for thousands of year will be expropriated, cited in Colchester, La Rose & James, *supra* note 30 at 15-16.

<sup>83</sup> British Guiana Independence Conference Report (1962-1965) Annex c para. 1: "The Government of British Guyana has decided that the Amerindians should be granted legal ownership or rights of occupancy over areas and reservations or parts thereof where any tribe or community of Amerindians is now ordinarily resident or settled and other legal rights, such as rights of passage, in respect of any other lands where they now by tradition or custom de



approach in the post-independence era has been to deny Amerindians the full extent of their territories claimed; the government has done this by failing to establish effective laws and policy measures for addressing outstanding land claims in a timely and efficient manner. With the opening up of the interior for mining, logging, conservation, and other developmental activities since the late 1980s, the demand for land by Amerindians has intensified as Amerindians seek to defend their territories from the encroachment or wanton destruction caused by these activities.<sup>84</sup>

In 1997, the government announced the formation of the Task Force on Amerindian Lands, to be headed by the Minister for Amerindian Affairs, which would survey and certify Amerindian land titles.<sup>85</sup> According to the plan, the task force would address Amerindian land rights in three phases. In the first phase, the task was to survey and certify existing titled areas. In the second phase, those settlements that were without titles would be surveyed and granted to Amerindians. Finally, in the third phase, the government would consider requests for the extension of titles by Amerindian communities. Shortly after the task force started its work, the situation became very problematic. Communities were complaining that they were only receiving smaller portions of the lands that they initially knew to be theirs and that the lands were being demarcated without their full knowledge and participation. There were also complaints that communities were informed by government officials that once their existing titles were demarcated, there would be no opportunity for extensions, although there had been some assurance about the possibility of extensions when the task force was created. Due to these problems, Amerindian leaders and their representatives rejected the task force process, which was characterized as “humiliating, insulting, discriminatory and a violation of their human right.”<sup>86</sup> They called on the government to cease pressuring their communities into accepting unsatisfactory demarcation and titles.<sup>87</sup>

In 1998, the first major lawsuit was filed in the high court; it sought the court’s determination on whether native title continued in Guyana following the assertion of British

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facto enjoy freedoms and permissions corresponding to rights of that nature. In this context it is intended that legal ownership shall comprise all rights normally attaching to such ownership.”

<sup>84</sup>Colchester, La Rose & James, *supra* note 30.

<sup>85</sup>James, *Indigenous Peoples Land Rights*, *supra* note 35 at 4.

<sup>86</sup>*Report of the First National Toshias Conference*, Zeriwa, 27-30 April 1999 (Guyana: Amerindian Peoples Association, 1999), cited in Colchester, La Rose and James, *supra* note 30 at 18.

<sup>87</sup>*Ibid.*

sovereignty over the Guyana shield.<sup>88</sup> To date however, the court has failed to make any ground-breaking decision that could significantly impact the future of Amerindian unresolved territorial claims in Guyana.

In 2006, the government passed the revised *Amerindian Act 2006*, which came into force in 2010. Though expectations were high, the legislation failed to establish effective criteria for addressing land issues. Under sections 59 and 60 of the legislation, the Minister of Amerindian Affairs is vested with the sole authority and unfettered discretion to make decisions regarding the granting of land titles and extensions to communities. Although the government boasts that this process has resulted in significant portions of lands being granted to Amerindian people, in actuality, this approach is rife with problems. A *Reuters* news article, for example, serves to illustrate some of these weaknesses. It states that indigenous leaders have accused the government of snatching their traditional lands through poor demarcation, saying that, in some areas, communities were demarcated without their knowledge.<sup>89</sup> John Adries, leader of the Parima community that is inhabited by 600 Arekuna people, is quoted as saying, “some community lands are being sliced by half, some by quarter, some by three-quarters.”<sup>90</sup> To date, Amerindian titled lands cover 14 percent of the country; however, it is important to bear in mind that this is only between half and one third of the areas claimed.<sup>91</sup> Moreover, these titled lands bear little resemblance to the areas claimed by Amerindians and they fail to take account of Amerindian traditional subsistence practices, tenure systems, and land use patterns.

#### *The Impact of Development Activities on Amerindians*

Insecure land rights have made Amerindians vulnerable to multiple forms of abuse and exploitation resulting from development activities promoted in their territories since the late 1980s. The government’s promotion of mining activities that have weak governmental controls and ineffective regulatory mechanisms have had devastating consequences for indigenous peoples and have amounted to serious cases of human rights abuse. In August 1995, the negligent actions by OMAI Gold Mines Inc., a subsidiary of Cambior Inc., resulted in a tailings

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<sup>88</sup> *Van Mendason et al v Attorney General of Guyana*, *supra* note 55.

<sup>89</sup> Neil Marks, “Guyana indigenous peoples charge land abuses” *Reuters* (30 June, 2010), online: Reuters <<http://www.reuters.com/article/2010/06/30/us-guyana-land-idUSTRE65T6UW20100630>>.

<sup>90</sup> *Ibid.*

<sup>91</sup> Colchester & La Rose, *supra* note 50.

dam failure that caused millions of gallons of clay and cyanide-laced toxic waste to leak into the Essequibo River and its tributaries. The river system represents the only water and a major food source for over 23,000 Amerindian residents. Suits were filed against the company by local residents in the local Guyanese court and later in Quebec.<sup>92</sup> In 2002, the Guyanese court hearing the case dismissed the claim. In 2003, a new claim was brought against Cambior Inc., seeking redress for the damages resulting from the bursting of the dam. In October 2006, the Guyanese court dismissed the claim and ordered the victims to pay for the expenses Cambior Inc. incurred during the trial.<sup>93</sup> The case was dismissed in Quebec on the *forum non conveniens* principle.

Small- and medium-scale mining activities with weak institutional controls and ineffective regulatory mechanisms were also promoted by the government; this had devastating consequences for Amerindians. Numerous studies carried out in Guyana's interior<sup>94</sup> reveal that unregulated mining activities have significantly undermined Amerindian traditional ways of living, interfering with their subsistence economies and threatening their welfare and future survival. Mining, according to these studies, has resulted in severe environmental degradation, pollution of important waterways, and disruption of vital ecosystems. Mercury burned in open air and later accumulated in fish has led to mercury poisoning, and has contributed to serious health problems, increased birth defects, and even death. Pits left open are a breeding ground for mosquitoes, resulting in increased malaria infections.

The issuing of logging permits, concessions, and licences to major East Asian companies without consulting indigenous peoples has also had devastating impacts on Amerindian communities and livelihoods. In 1991, for example, the government granted approximately 1.69 million hectares of forests to a Malaysian/ Korean group, Barama Company Limited, which quickly became the largest producer and exporter of timber. This concession hemmed in four

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<sup>92</sup> Recherches Internationales Québec v. Cambior Inc. [1998] Q.J.No. 2554, a decision of Justice Maughan of the Québec Superior Court (Class Action), District of Montreal, August 14, 1998.

<sup>93</sup> Véronique Van Der Plancke *et al*, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (International Federation for Human Rights, 2010) at 196.

<sup>94</sup> Colchester, La Rose & James, *supra* note 30. See also an on the ground assessment of mining carried out by the International Human Rights Clinic in 2007, *All That Glitters: Gold Mining in Guyana-The Failure of Government Oversight and the Human rights of Amerindians Communities* (Cambridge: International Human Rights Clinic, 2007). This assessment revealed similar findings: According to that study, gold mining in Guyana's interior regions has caused severe human rights abuses and devastating environmental damage. The report provides an in-depth study of the impact of small and medium scale gold mining on Amerindian indigenous communities, including violations of Amerindian rights to health, safe water; security of property; enjoyment of culture; and, security of person.

indigenous communities with land titles, penetrated the Carib reservation that had been established in 1977, and encircled a number of other untitled indigenous farmlands located along the main rivers, thus turning several indigenous communities into squatters.<sup>95</sup>

Guyana's REDD+ policies follow in the path of these activities, which have already caused harm to indigenous peoples. As this thesis will show, REDD+ has the potential to produce similar, if not more devastating consequences if it is developed without properly safeguarding indigenous peoples' rights. This underscores why Guyana must adopt adequate laws and policy measures to ensure that the rights of its most vulnerable citizens are not further compromised.

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<sup>95</sup> Tony James, *supra* note 35.

## Chapter 2

### **Guyana's REDD+ Model: Preserving the rainforest as asset for the world**

This chapter focuses on Guyana's REDD+ model. It begins with an overview of REDD+ and its architecture at the global level. It then focuses on Guyana's REDD+ model. To this end, it examines the partnership between Guyana and Norway and outlines Guyana's progress in designing and implementing REDD+. This chapter will also consider some the contentious issues that have arisen in the development of Guyana's REDD+ model.

#### *Global Efforts to Mitigate Climate Change through Reducing Emissions from Deforestation and Degradation-Plus*

Reducing Emissions from Deforestation and Degradation- Plus (REDD+) is a new and controversial climate change mitigation scheme that is being promoted and negotiated within the context of the United Nations Framework Convention on Climate Change (UNFCCC). REDD stands for Reducing Emission from Deforestation and Degradation in Developing Countries. The plus refers to carbon Stock enhancement.<sup>96</sup> It is a scheme that captured the international community's attention, after years of hard bargaining and negotiations failed to produce a policy architecture that adequately addresses the complexities of climate change,<sup>97</sup> a phenomenon which the Intergovernmental Panel on Climate Change (IPCC) concluded in 2007 is now unequivocally occurring.<sup>98</sup>

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<sup>96</sup> For further information on Climate Change see: Spencer R. Weart, *The Discovery of Global Warming: New History of Science, Technology and Medicine, Revised and Expanded ed.* (USA: Harvard University Press, 2005) at 1-10; Joseph F.C. DiMento & Pamela Doughman, eds., *Climate Change: What it Means for Us, Our Children, and Our Grandchildren* (Cambridge: The MIT Press, 2007) at 23-26; Michael Grubb *et al*, *The Kyoto Protocol: A Guide and Assessment* (United Kingdom: Royal Institute of International Affairs, 1999) at 3. See also, Stephen H. Schneider and Janica Lane, "An Overview of 'Dangerous' Climate Change" in Hans Joachim Schellnhuber *et al*, eds., *Avoiding Dangerous Climate Change* (United Kingdom: Cambridge University Press, 2006) Chapter 2; B.D Santer and T.M.L Wigley, "Progress in Detection and Attribution Research" in Stephen H. Schneider *et al*, eds., *Climate Change Science and Policy* (United States: Island Press, 2010) at chapter 2.

<sup>97</sup> David G. Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming* (Princeton and Oxford: Princeton University Press, 2001) at chapter 1.

<sup>98</sup> R.k. Pachauri & A. Reisinger, eds., *Climate Change Synthesis Report: Contribution of the Working Groups I, II and III to the Fourth Assessment of the Intergovernmental Panel on Climate Change* (Geneva, Switzerland: IPCC, 2007) at 30.

REDD+ targets forests in tropical/developing countries to fight climate change. According to the IPCC and the Stern Review, carbon dioxide (CO<sub>2</sub>) emissions resulting mainly from deforestation and forest degradation are now one of the leading causes of climate change; deforestation and forest degradation currently accounts for some 17–20 percent of overall greenhouse gas emission (GHG), a share greater than is produced by the global transport sector.<sup>99</sup> Addressing this source of emissions through protecting and conserving forest is seen as a way to achieve deep cuts in GHG emission that occur at a low economic cost and within a relatively short period of time, when compared to other sources of GHG emissions, such as fossil fuels.<sup>100</sup> Consequently, within the context of the UNFCCC, there are now ongoing efforts to forge an agreement on an appropriate policy framework largely centered on reducing emissions from deforestation and degradation in developing countries in the post-2012 era. A central feature of this policy framework is the mobilization of financial resources from the industrialized countries to the tropical south through a fund- or market-based mechanism to compensate developing countries for the opportunity costs of avoiding emissions from deforestation and degradation.<sup>101</sup>

#### *Forests under the UNFCCC*

REDD+ is not a new concept; addressing deforestation has long been viewed by the UNFCCC as a means for fighting climate change. During the negotiating years of the Kyoto Protocol, one of the key questions under debate was whether avoided deforestation should form part of the binding Kyoto Protocol. After years of painstaking bargaining and negotiation, it was specifically decided that, for methodological and political reasons, avoided deforestation would not be part of the binding protocol.<sup>102</sup>

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<sup>99</sup> Metz *et al*, *supra* note 3 at 543-545; Nicholas Stern, *supra* note 3 at 216.

<sup>100</sup> Metz *et al*, *Ibid.*; Nicholas Stern, *Ibid.*, at 217.

<sup>101</sup> Jacob Phelps, Edward L. Webb & Arun Agrawal, “Does REDD+ Threaten to Recentralise Forest Governance” (2010) 328 *Science* 312-313; Frances Seymour, “Forest, Climate Change, and Human Rights: Managing Risks and Trade-offs” in Stephen Humphreys, ed., *Human Rights and Climate Change* (Cambridge: Cambridge University Press, 2010) at 6.

<sup>102</sup> Raymond E. Gullison *et al* “Tropical Forests and Climate Policy” (2007) 316 *Science* 985; William Boyd, “Deforestation and Emerging Greenhouse Gas Compliance Regimes: Toward a Global Environment Law on Forest, Carbon and Climate Governance” in Valentina Bosetti and Ruben Lubowski, eds., *Deforestation and Climate Change: Reducing Emission from Deforestation and Forest Degradation* (United Kingdom: Edward Elgar Publishing Limited, 2010) at 2-4.

This position changed in 2005, when parties to the UNFCCC, meeting in Montreal to discuss future actions to address the global climate problem, were re-invited by prominent members of the coalition for rain forest nations to re-consider the notion of addressing tropical deforestation to halt climate change. In a draft proposal, “Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action,”<sup>103</sup> the forested nations of Papua New Guinea and Costa Rica pointed out that the Kyoto Protocol did not include mechanisms through which developing countries could reduce emissions by curtailing deforestation. They asked the parties to consider financing “environmental sustainability” as a way to draw developing nations towards emission reductions. The proposal suggested the use of carbon markets to assign a monetary value to environmental resources and to create funds for sustainable development. Their proposal received wide support from many countries and the Conference of the Parties (COP) established a contact group, thereafter beginning a two-year process to explore options for REDD+.<sup>104</sup>

One year later, support for the inclusion of forest preservation in a post-Kyoto climate change framework came from the UK government. In 2006, the Stern Review called attention to the fact that 20 percent of global greenhouse gas emissions (GHG) were due to land use change. It noted that most of the emissions were from deforestation in developing countries, a share greater than the emissions produced by the global transport sector. The review asserted that controlling deforestation could provide one of the least expensive strategies for reducing emissions, and that such efforts must be a key element of any future climate protection regime.<sup>105</sup> Consequently, there has been a growing consensus at the global level that forests should be included in a future climate change regime as part of a comprehensive solution to climate change.

At the Thirteenth Conference of the Parties (COP13) to the UNFCCC in December 2007, held in Bali, Indonesia, REDD+ was officially launched. Parties to the UNFCCC adopted the

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<sup>103</sup>“Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action” (Submission by the Governments of Papua New Guinea & Costa Rica to the Eleventh Conference of the Parties to the UNFCCC, 2005).

<sup>104</sup> *Ibid.*; R. Wainwright *et al*, *From green ideals to REDD money: A brief history of schemes to save forest for their carbon* (Netherlands: FERN, 2008) at 1.

<sup>105</sup> Nicholas Stern, *supra* note 3 at 216.

Bali Action Plan, which launched a process designed to adopt a decision at COP15 on a range of issues, including

policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.<sup>106</sup>

The Bali Action Plan also invited parties to explore actions to address the causes of deforestation and to further support REDD+ efforts on a voluntary basis. It also encouraged those parties deemed to be “in a position to do so” to provide support for improvement of REDD+ data collection and estimations, monitoring and reporting, and institutions in developing countries. Since the launch of REDD+ at Bali, parties to the UNFCCC have been engaged in ongoing negotiations to forge an agreement on an appropriate policy framework—to take effect post-2012, when the Kyoto Protocol expires—largely centered on reducing emissions from deforestation and degradation in developing countries. The initial hope was that this agreement would have been concluded at the Fifteenth Conference of the Parties (COP15) held in Copenhagen, Denmark in December 2009. However, this did not materialize, as nation-states failed to reach consensus on key issues such as financing.

The Copenhagen Accord, which was adopted at COP15, did, however, recognize “the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emission by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism including REDD+, to enable the mobilization of financial resources from developed countries.”<sup>107</sup> To that end, the parties committed to scale up funding of up to US\$30 billion for the period of 2010–2012; this funding would enable and support enhanced action on mitigation, including substantial financing to reduce emissions from deforestation and forest degradation, adaptation, technology development and transfer, and capacity building.<sup>108</sup>

The Cancun Agreement, adopted at the Sixteenth Conference of the Parties held in Cancun, Mexico from November 29<sup>th</sup> to December 10<sup>th</sup>, 2010, established a broad framework for

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<sup>106</sup> Paragraph 1.(b)(iii), Decision 1/CP.13, UNFCCC, 2007.

<sup>107</sup> FCCC/CP/2009/L.7 at para. 6.

<sup>108</sup> *Ibid.* at para. 8.



the advancement of REDD+ and established a number of environmental and social safeguards for the development of REDD+. <sup>109</sup> Parties also agreed to create a Green Climate Fund, which will mobilize up to US\$100 billion per year by 2020.

At the Seventeenth Conference of the Parties held in Durban, South Africa from November 28 to December 11, 2011, a number of decisions were adopted which are designed to implement the Cancun Agreements (FCCC/CP/2011/9/Add.1). The Green Climate Fund, which was created at COP 16 was launched. The Monitoring, Reporting and Reporting System (MRV) created at Cancun was made operational. Finally, the Parties also re-affirmed the safeguards adopted at Cancun which are designed to guide the REDD+ development process.

### *Incentive Mechanism for REDD+ Activities*

A central feature of the policy framework under consideration is the creation of a positive incentive mechanism that will make payments to tropical/developing countries conditional on their performance in reducing national deforestation levels. <sup>110</sup> This will involve estimating a reference scenario that projects the amount of deforestation that would have occurred in the absence of the payment. If deforestation is reduced below this established baseline, then countries will be paid for the forest carbon emissions avoided. <sup>111</sup>

Based on the proposals submitted by member states to the UNFCCC, this incentive mechanism could either be fund-based, market-based, or a combination of both. Under a fund-based mechanism, developed countries would put resources into a joint pool that would then be distributed to developing countries. Under a market-based mechanism, developing countries participating in conservation activities would openly sell their carbon credits on the international carbon market. These in turn would be purchased by developed countries to offset their emission targets. <sup>112</sup> Whatever form this incentive mechanism takes, the central idea is that developing

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<sup>109</sup> Draft decision-/CP.16 at paras. 70-79.

<sup>110</sup> Phelps *et al*, *supra* note 101.

<sup>111</sup> For further reading, see Arild Angelsen, "How do we set the reference levels for REDD payments?" in Arild Angelsen ed., *Moving Ahead with REDD: Issues, Options and Implications* (Indonesia: Center for International Forestry Research, 2008); Shelia Wertz-Kanounnikoff *et al*, "How can we monitor, report and verify carbon emissions from forest?" in Arild Angelsen ed.

<sup>112</sup> Charlie Parker *et al*, *The Little REDD Book*, *supra* note 4; Charlie Parker *et al*, *The Little Climate Finance Book: A guide to financing options for forest and climate change* (United Kingdom: Canopy Capital Program, 2009). For

countries must be compensated for their efforts to manage and conserve standing forest. Estimates predict that financial flows from developed to developing countries for REDD+ forest preservation activities could reach up to US\$30 billion per year.<sup>113</sup>

### *Programmes Pioneering REDD+*

While an international agreement on REDD+ is still pending, chiefly because the international community has not reached agreement on financing, it is safe to say that, in practice, REDD+ has already been initiated at both the national and international levels.<sup>114</sup> In parallel with the UNFCCC's ongoing climate negotiations, a number of international agencies (the World Bank,<sup>115</sup> United Nations Food and Agricultural organization, United Nations Development Programme),<sup>116</sup> governments (Norway),<sup>117</sup> conservation NGOs,<sup>118</sup> and even private corporations<sup>119</sup> have established a series of significant international forest and climate initiatives, which support governments and private individuals in designing REDD+ strategies and implementing "demonstration" activities. These initiatives are designed to achieve a number of purposes: Some are geared towards providing on-the-ground information about the application of varied REDD+ designs across different contexts that will go towards the strengthening REDD+ negotiations. Others are geared towards providing forested nations with knowledge, capacity

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further information on carbon trading see, Jutta Kill *et al*, *Trading Carbon: How it works and why is it controversial* (Netherlands: FERN, 2010) at 7; Bayon H. Hamilton, *Voluntary Carbon Markets* (United Kingdom: Earthscan, 2007) at 4-5; Anja Kollmuss *et al*, *Handbook of Carbon Offsets Programs: Trading Systems, Funds, Protocols and Standards* (United Kingdom: Earth Scan Publishing, 2010) at 67; Labatt & Rodney R. White, *Carbon Finance: The Financial Implications of Climate Change* (New Jersey: John Wiley & Sons Inc., 2007) at 140-142; Tom James, *Energy Markets: Price Risk Management and Trading* (New Jersey: John Wiley & Sons (Asia) Pte LTD, 2008) at 127.

<sup>113</sup> UN-REDD Programme, *About REDD+*, online: UN-REDD Programme < <http://www.un-redd.org> >.

<sup>114</sup> *Intergovernmental Taskforce Synthesis Report: REDD+ Financing and Activities Survey* (Norway: Oslo Climate and Forest Conference, 2010).

<sup>115</sup> World Bank. *Forest Carbon Partnership Facility*, online: FCPF < <http://www.forestcarbonpartnership.org/fcp/> >.

<sup>116</sup> UN-REDD Programme, *supra* note 113

<sup>117</sup> Norway, *The Government of Norway's International Forest and Climate Initiative*, online: Norway < [www.regjeringen.no/climate-and-forest-initiative](http://www.regjeringen.no/climate-and-forest-initiative) >.

<sup>118</sup> *Intergovernmental Taskforce Synthesis Report*, *supra* note 113 at 18, 26.

<sup>119</sup> David Fogarty & Sunanda Creagh, "Indonesia project boost global forest CO2 market" *Reuters* (24 August 2010), online: Reuters < <http://af.reuters.com/article/energyOilNews/idAFSGE67N0D920100824?sp=true> >.

building, and experience to effectively participate in a future REDD+ mechanism, yet still others are geared towards profit making.<sup>120</sup>

### *Guyana Participating in REDD+ Demonstration Initiatives*

The prospect of earning windfall profits for forestry preservation and protection has resulted in a number of forested countries offering up all or parts of their forest to participate in REDD+ demonstration projects and readiness activities under the Forest Carbon Partner Facility (FCPF), the UN-REDD Programme and other bilateral and private initiatives. Consequently, forested nations across the developing world—from the Amazon to the Pacific—are now actively engaged in REDD+ activities, even though an official agreement on REDD+ is still pending within the UNFCCC.<sup>121</sup> The Co-operative Republic of Guyana is no exception.

In 2008, former Guyanese president Jagdeo announced that the Guyanese people might be willing to deploy their whole forest in service of the world battle against climate change, providing that the right incentives were paid and their sovereignty was not compromised.<sup>122</sup> Since then, he repeatedly offered up the forest to be included in a future REDD+ regime. In June 2009, he launched a Low Carbon Development Strategy (LCDS) for the country.<sup>123</sup> This is a national strategy that seeks to create “a low-deforestation, low carbon, climate-resilient economy, with the major objective being the transformation of the economy of Guyana while combating climate change.”<sup>124</sup> The LCDS sets out how Guyana “can work within the emerging international partnership to provide the world with a model on how immediate action can stimulate the creation of a low-deforestation, low-carbon, climate-resilient economy.”<sup>125</sup> The central feature of the LCDS is placing almost all of the country’s rainforest (15 million hectares) under long-term protection.<sup>126</sup> This initiative will be undertaken in return for monetary incentives, which will be used to assist Guyana to pursue a path to sustainable development, such as investing in strategic

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<sup>120</sup> Tom Griffiths, *Seeing ‘REDD?’: Forest, Climate Change Mitigation and the Rights of Indigenous Peoples and Local Communities* (United Kingdom: Forest Peoples Programme, 2009) at 1.

<sup>121</sup> *Intergovernmental Taskforce Synthesis Report*, *supra* note 113.

<sup>122</sup> *Low Carbon Development Strategy*, *supra* note 1 at 2.

<sup>123</sup> “Strategy marrying economic growth to climate change fight launched” *Stabroek News* (9 June 2009), online: *Stabroek News*, < <http://www.stabroeknews.com> >.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Low Carbon Development Strategy*, *supra* note 1 at 16.

<sup>126</sup> *Ibid.* at 7.

low-carbon emission economic activities, improving social service (health, education) deliveries, promoting sustainable development, and achieving the Millennium Development Goals (MDG).<sup>127</sup> According to studies by consulting firm McKinsey, Guyana's forest contributes an economic value to the nation (EVN) of approximately US\$580 million per year.<sup>128</sup> This is the amount of money that Guyana could otherwise earn for pursuing a rational economic path of development mainly through deforestation, and it is the opportunity cost for Guyana to participate in REDD+. This means that Guyana must be compensated this amount in order to forgo other development activities that would otherwise result in the destruction of the forest.

The LCDS is the overarching framework in which Guyana's REDD+ initiatives will be developed and all of its partnerships grounded. The LCDS is actually more so a developmental than a conservation model. It goes beyond REDD+ in that it is not only geared towards forestry conservation, but also towards promoting sustainable development. In this regard, it is considered an innovative strategy.<sup>129</sup> Guyana's LCDS is premised on the notion that an international agreement on REDD+ will be concluded in the near future and at that time, Guyana will enter into the global carbon-trading market. In the interim, the government has been seeking financing to kick start the LCDS.

#### *Guyana's Partnership with Norway*

In November 2009, Guyana and Norway signed a Memorandum of Understanding (MOU), under which Guyana will accelerate its efforts to limit forest-based greenhouse gas emissions and protect its rainforest as an asset for the world. Norway, in return, will provide financial support to Guyana at a level based on the country's success in limiting emissions. It was agreed that Norway would pay US\$30 million (approximately GUY-\$ 6.2 billion) in 2010 and potentially up to US\$250 million (GUY-\$51.7 billion) by 2015.<sup>130</sup> Through this partnership,

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<sup>127</sup> *Ibid.* at 8, 25-29.

<sup>128</sup> McKinsey Report, *Creating Incentives to Avoid Deforestation: Saving the World's Forests Today* (Republic of Guyana: Office of the President, 2008).

<sup>129</sup> Doe *et al*, *Independent Review of the Stakeholder Consultation Process for Guyana's Low Carbon Development Strategy* (Geneva: International Institute for Environmental Development, 2009) at 3.

<sup>130</sup> "Norway offers up to US\$25M under new forest pact with Guyana" *Stabroek News* (10 Nov 2009), online: *Stabroek News*, < <http://www.stabroeknews.com> >.

Norway and Guyana hope to provide the world with an example of how REDD+ might operate for a High Forest Cover, Low Deforestation (HFCLD) country.<sup>131</sup>

### *Performance Based Partnership*

The Norwegian partnership is performance based. Although in actuality some of these conditions have been relaxed or waived, in theory, there are a number of conditions that Guyana must satisfy before payments are released. The Joint Concept Note (JCN),<sup>132</sup> which accompanied the Memorandum of Understanding, listed two main conditions: first, Guyana must limit its deforestation and forest degradation according to the interim indicators agreed to by the parties, and second, Guyana must make progress in complying with a number of enabling activities agreed to by the parties.<sup>133</sup>

### *Limiting Deforestation and Degradation*

The partnership provides that, in limiting deforestation and degradation, Guyana's rate of deforestation must not exceed the agreed baseline/reference level as set by the parties in the Joint Concept Note, and the country must avoid any measurable increase in forest degradation. This reference level is stated as 0.29 percent per annum.

### *Indicators of Enabling Activities*

The indicators of enabling activities are a set of policies and safeguards that Guyana must maintain to ensure that REDD+ contributes to the achievement of the goals of the Memorandum of Understanding signed between Guyana and Norway. These indicators require Guyana to:

1. Develop its REDD+ initiatives in consistent and transparent manner, through an internationally recognized framework for developing a REDD+ programme;
2. Maintain a systematic and transparent process of multi-stakeholder consultations, enabling the participation of all potentially affected and interested stakeholders at all stages of the REDD+/LCDS process. This process should continue to evolve over time. Particular attention must be given to the full and effective participation of indigenous peoples and other forest-dependent communities;

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<sup>131</sup> *Low Carbon Development Strategy*, *supra* note 1 at 16.

<sup>132</sup> Joint Concept Note, available at <http://www.lcds.gov.gy/>.

<sup>133</sup> *Ibid.*

3. Undertake independent assessments of current forest governance and logging practices as performed by the Center for International Forestry Research (CIFOR) and the Food and Agriculture Organization of the United Nations (FAO). In addition, Guyana must develop a transparent, rules-based, inclusive forest governance, accountability and enforcement system in accordance with international standards;
4. Create a Guyana REDD+ Investment Fund (GRIF), which will be a multi-donor financial mechanism managed by a reputable international organization before any funds can be distributed;
5. Develop a credible national system to monitor, report, and verify (MRV) emissions or removals of carbon from Guyana's forest sector. The MRV system must provide the basis for reporting in accordance with the principles and procedures of estimation and reporting of carbon emissions and removals at the national level as specified by the IPCC Good Practice Guidelines and Guidance for reporting on the international level, as well as meeting the particular data needs of the national RGDP;
6. Respect and protect rights, and enable the effective participation of indigenous peoples and other local forest communities in planning and implementation of REDD+ strategy and activities, and;
7. Subject to annual independent overall assessment conducted by one or more neutral expert organization(s), to be appointed jointly by the participants in consultation with the international financial institution managing the GRIF, on whether or not the REDD+ enablers have been met, and what results Guyana has delivered according to the established indicators for REDD+ performance.

### *Progress in Implementing Guyana's Low Carbon Development Strategy*

Guyana is currently in the process of implementing the country's low-carbon development strategy while simultaneously developing its monitoring, reporting, and carbon accounting system, and strengthening governance in the forestry sector. In October 2010, Norway's first tranche of money (US\$-30 million) was deposited into the Guyana REDD+ Investment Fund. Although highly criticized by local forestry experts and right activists, this tranche of money was not performance based.<sup>134</sup> According to the Guyanese government, this money will finance a number of developmental projects. These projects as set out in the LCDS include the following: the construction of 140 Mega Watt (MW) hydroelectric dam commonly known as the Amalia

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<sup>134</sup> Open Letter from Guyanese Civil Society to Minister Erik Solheim, Minister of the Environment & International Development, Norway, 24 March 2011.

project; demarcation of Amerindian lands; electrification of some Amerindian households through provision of solar panels; construction of a new US\$1.5 million biodiversity research centre; and a one-laptop-per-family project.<sup>135</sup>

The Amalia hydro dam is one of the biggest projects listed in the LCDS and was referred to by former president Jagdeo as the “flagship” of the LCDS.<sup>136</sup> The estimated cost for the Amalia hydropower project is US\$600-650 million. Potential financiers of the project include the China Development Bank, the China Railway First Group, the Inter-American Development Bank, and the Norwegian Government.<sup>137</sup> Of the US\$30 million of Norwegian funding for 2010, which has already been transferred to the GRIF, the president planned to use US\$15–19 million to purchase government equity in the Amalia Falls dam project. This for the construction of an access road to the site where the dam will be constructed.<sup>138</sup> Another notable project is the government’s plan to invest US\$6 million in the demarcation of Amerindian lands. This project, which will rely on government survey staff, will be run by the Ministry of Amerindian Affairs and the Guyana Lands and Surveys Commission under the supervision of UNDP, which will administer the grant from the GRIF.<sup>139</sup> There are a number of other projects on the table including the construction of a major highway between Guyana and Brazil, and large-scale agriculture and infrastructure projects that will begin as the LCDS progresses.

The first performance-based period had ended in 2010. According to the 2009–2010 progress report prepared by the Guyanese government, Guyana has complied with all the conditions set out in the JCN that accompanied the MOU.<sup>140</sup> The Rainforest Alliance, an international organization dedicated the conservation of tropical forest, was chosen by the government of Norway to independently verify whether Guyana had complied with all the enabling activities for the 2010 period. Overall, its much-criticized report<sup>141</sup> suggests that the

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<sup>135</sup> *Low Carbon Development Strategy*, *supra* note 1 at 53-61.

<sup>136</sup> Robert Goodland, *Guyana: Amalia Falls Hydro: Social and Environmental Aspects* (Washington D.C.: World Bank, 2010) at 5.

<sup>137</sup> *Ibid.* at 2.

<sup>138</sup> *Ibid.* at 1.

<sup>139</sup> *Low Carbon Development Strategy*, *supra* note 1 at 54; Chris Lang, “Increasing deforestation in Guyana gives Norway a headache” *Independent REDD Monitor* (27 January, 2011), online: Independent REDD Monitor

<sup>140</sup> *Guyana-Norway MOU: Annual Progress Report 2010* (Republic of Guyana: Office of Climate Change, 2010) at 3-9.

<sup>141</sup> See in this regard, “Letter from Forest Peoples Programme to Norway and Rain Forest Alliance (May 4, 2011)” which analyse the Rain Forest Alliance’s Report on verification on progress related to enabling activities for

government of Guyana is off to a positive start in terms of complying with the enabling activities, although a number of weakness were also identified.<sup>142</sup> Pöyry, a Finnish consulting company, was chosen to carry out an independent assessment of the forest for the Norway and Guyana Forestry Commission. Its findings suggest that the actual historical rate of deforestation in Guyana averaged out over several decades was only 0.02 percent per year, a figure which coincided with the UNFAO estimation.<sup>143</sup> More problematically, however, the report suggests that the actual rate of deforestation during the first year of the Norway–Guyana agreement was 0.06 percent. While this is still low, both as a rate and in terms of the actual area of forest lost, it is nevertheless three times the historical baseline rate.<sup>144</sup> This has raised questions about whether Guyana is actually committed to REDD+ and whether the government should receive any further payment. However, at the time of writing, it had been reported in the local Guyanese media that the second tranche of money, US\$40 million, was deposited by Norway into the GRIF.<sup>145</sup>

*Guyana and the Forest Carbon Partnership Facility (FCPF)*

In addition to the Norwegian partnership, Guyana is also seeking the assistance of the Forest Carbon Partnership Facility (FCPF) for the implementation of its LCDS and capacity-building initiative, which will help the country to better prepare for participation in a future REDD+ mechanism. The FCPF is a World Bank initiative which assists developing countries in their efforts to reduce emissions from deforestation and forest degradation, as well as in their efforts to foster conservation, sustainable management of forests, and enhancement of forest carbon stocks in order to provide value to standing forests. The FCPF is designed to set the stage for a large-scale system of incentives for reducing emissions from deforestation and forest

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“Guyana-Norway” REDD+ Agreement. The Forest Peoples Programme criticized the Rain Forest Alliance’s Report as providing an inaccurate on the ground assessment of progress in Guyana and relying too much on statements made by Government officials. Rain Forest Alliance was also accused of relying too heavily on Government documents, rather than on independent verification of those statements.

<sup>142</sup> Donovan *et al*, *Verification of Progress Related to Enabling Activities for The Guyana-Norway REDD+ Agreement* (United States: Rainforest Alliance, 2010) at 4-6.

<sup>143</sup> Guyana Forestry Commission, *Guyana REDD+ Monitoring, Reporting and Verification (MRVS) Interim Measure Report* (Republic of Guyana: Guyana Forestry Commission and Pöyry, 2010) at 60-62.

<sup>144</sup> *Ibid.*

<sup>145</sup> Janelle Persaud & Jasmaine Payne, “Norway releases another US40M into forest funds” *The Guyana Times* (7 April, 2011), online: Guyana Times International < <http://www.guyanatimesinternational.com/?p=5832>>.



degradation, providing a fresh source of financing for the sustainable use of forest resources and biodiversity conservation.<sup>146</sup>

In June 2009, Guyana's Readiness Plan (R-Plan) was approved by the FCPF. Readiness plans are the first step towards a country qualifying for payments under the FCPF.<sup>147</sup> Readiness plans involve developing a baseline reference scenario for the country's historical and projected deforestation rates, and adopting strategies to reduce forest clearing and to design systems that monitor, report, and verify reductions in greenhouse gas emissions from avoided deforestation. The FCPF's approval means that Guyana is likely to benefit from the Facility's Readiness Mechanism Phase grant of US\$3.6 million to help prepare to the country to participate in the Carbon Finance Mechanism (or Carbon Fund) of the FCPF. In 2010, a grant agreement was signed by the Government of Guyana and the World Bank entitling Guyana to an initial amount of US\$200,000 under the FCPF for readiness activities.<sup>148</sup>

#### *Guyana's REDD+ Model*

Guyana's REDD+ model is lauded at both the local and international levels as a model that is unique and innovative. As the country's high-profile Low Carbon Development Draft Strategy explains, Guyana seeks to expand the vision of REDD+ from one of awarding narrow payments solely contingent on a baseline of deforestation to one that supports more holistic low-carbon development investments for those countries that have to-date kept their forest largely intact.<sup>149</sup> What this means is that since Guyana is not a country that historically has high rates of deforestation, it would not be compensated to stop deforestation; the approach that Guyana takes can more accurately be described as avoiding future deforestation. Moreover, while there are a number of REDD+ projects around the globe,<sup>150</sup> Guyana is one of the first countries that will attempt REDD+ at a national level.<sup>151</sup> Guyana boasts that it will avoid emissions of 1.5 gigatons

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<sup>146</sup> For more information on the FCPF, see <http://www.forestcarbonpartnership.org/fcp/>.

<sup>147</sup> "FCPF approves R-Plans for Guyana and Panama" *Bank Information Center* (29 June 2009), online: Bank Information Center, < <http://www.bicusa.org/EN/Article.11278.aspx>>.

<sup>148</sup> "\$US200,000 World Bank's grant approved" *Stabroek News* (7 April, 2010), online: Stabroek News <http://www.stabroeknews.com/2010/news/stories/04/07/us200000-world-bank-grant-approved/>.

<sup>149</sup> *Ibid.*

<sup>150</sup> Indonesia, Suriname, Peru, the Democratic Republic of Congo, Tanzania, Papua New Guinea etc.

<sup>151</sup> *Low Carbon Development Strategy*, *supra* note 1 at 22.

of CO<sub>2</sub> emissions by 2020 that would have been produced by an otherwise economically rational development path that would involve deforestation.<sup>152</sup>

In addition to its unique and innovative qualities, Guyana's REDD+ model is also touted as a model that will bring a number of benefits to the country. From an economic perspective, the LCDS is arguably a strategy that will stimulate a low-carbon economy through several routes; in turn, it is expected that this will create a new generation of economic activities and social progress. These activities include advancing investment in strategic low-carbon economic infrastructure such as a hydropower development; improved access to unused, non-forested land; and improved fibre optic bandwidth technology. In addition, the following actions are proposed: nurturing high-potential, low-carbon sectors, such as fruits and vegetables, aquaculture, sustainable forestry, and wood processing; and investing in low-carbon business development opportunities, such as Information Communication Technology (ICT), business-process outsourcing, and ecotourism.<sup>153</sup>

From an environmental perspective, forestry preservation is also viewed as an initiative that would greatly assist Guyana in its own resistance to climate change. Guyana has a coastline that is 2.4 metres below sea level, and this coastline is home to approximately 90 percent of the country's population and most of its arable farming lands. Rising sea levels from climate change will have serious, if not devastating, implications for these low-lying areas. Since the last decade, scientists have been pondering the effects that rising sea levels could have on Guyana's coast. In 2000, scientists at a seminar at the University of Guyana's Institute of Applied Sciences voiced concerns that any marked rise in sea level could result in the coastal area, (including major centres such as Georgetown and New Amsterdam) becoming seriously flooded.<sup>154</sup> In February 2007, The World Bank published a paper, "The Impact of Sea Level Rise on Developing Countries: A Comparative Analysis," in which the authors concluded that some countries would face severe loss of land. They stated that Suriname and Guyana would be very badly affected as most of their populations live in low-lying areas.<sup>155</sup>

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<sup>152</sup> *Ibid.* at 17.

<sup>153</sup> *Low Carbon Development Strategy*, *supra* note 1.

<sup>154</sup> Shirley Thomas, "Scientists ponder the effects of rising sea on Guyana's coast" *Guyana Chronicle* (November 3, 2000), online: Land of Six Peoples Archives <<http://www.landofsixpeoples.com/news/nc01103.htm#TOP>>.

<sup>155</sup> Susmita Dasgupta *et al*, *The Impact of Rising Levels on Developing Countries: A Comparative Analysis* (Washington DC: World Bank, 2007); Note also, in March 2007, a study by the International Institute for

### *Support for Guyana's REDD+ Model*

Guyana's REDD+ model has been warmly welcomed at the global, regional, and domestic levels. It has been lauded by world leaders<sup>156</sup> and even movie stars.<sup>157</sup> It was featured positively in both the *New York Times*<sup>158</sup> and the *Asia-Pacific Courier*.<sup>159</sup> In April 2010, former president Jagdeo was awarded the 2010 Champions of the Earth Award by the United Nations Environmental Programme (UNEP).<sup>160</sup> He received this prestigious award for his outstanding international leadership on combating climate change and for his pioneering model on low-carbon economic development. In presenting the prestigious award, UN Under-Secretary-General and UN Environmental Programme Executive Director, Achim Steiner, was quoted in the *Guyana Chronicle*: "President Jagdeo is a powerful advocate of the need to conserve and more intelligently manage the planet's natural and nature-based assets. He has recognized more than most the multiple Green Economy benefits of forests in terms of combating climate change, (and) also in terms of development; employment; improved water supplies and the conservation of biodiversity."<sup>161</sup> Similar praises have been uttered by Lord Nicholas Stern, who described the former president as "one of the world's foremost heads of government in advocating for a global low-carbon future,"<sup>162</sup> adding that his leadership on this issue is perhaps "one of the most optimistic developments."<sup>163</sup>

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Environment and Development in the United Kingdom, Columbia University and the City College of New York, listed Guyana among the countries with the most vulnerable populations, with a vulnerability of 55%.

<sup>156</sup> "Jagdeo wins royal kudos for leadership in climate change fight" *Stabroek News* (November 21, 2009) Britain's Prince Charles, at a meeting of his Rainforest Fund in London, praised President Bharrat Jagdeo's "incredible leadership" in combating climate change by dedicating Guyana's entire forests to the cause.

<sup>157</sup> "Jagdeo gains support for LCDs" *Stabroek News* (September 23, 2009) Actor Harrison Ford, was quoted as saying: "By having the foresight to recognize that serving the needs of the planet could also help the people of Guyana, President Jagdeo is helping to change the way we think about economic development and climate change."

<sup>158</sup> Erica Gies, "Guyana Offers a Model to Save Rain Forest" *New York Times* (8 December, 2009), online: *New York Times* < <http://www.nytimes.com/2009/12/08/business/global/08iht-rbogeeco.html?ref=guyana>>.

<sup>159</sup> "Bold Low Carbon Strategy" *Courier N21 N.E* (January-February 2011) at 49-50. Online: *Courier* < [www.acp-eucourier.info](http://www.acp-eucourier.info)>.

<sup>160</sup> United Nations Environmental Programme, News Release, "Green Economy Takes Centre Stage at UNEP 2010 Champion of the Earth Awards" (April 22, 2010), online: UNEP <

<http://www.unep.org/Documents.Multilingual/Default.asp?ArticleID=6538&DocumentID=620&l=en>>.

<sup>161</sup> "President Jagdeo receives 2010 Champion of the Earth Award from UNEP" *Guyana Chronicle* (23 April, 2010) Online: *Guyana Chronicle* <

[http://www.guyanachronicleonline.com/site/index.php?option=com\\_content&view=article&id=12422:president-jagdeo-receives-2010-champion-of-the-earth-award-from-unep&catid=4:top-story&Itemid=8](http://www.guyanachronicleonline.com/site/index.php?option=com_content&view=article&id=12422:president-jagdeo-receives-2010-champion-of-the-earth-award-from-unep&catid=4:top-story&Itemid=8)>.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

### *Criticisms of Guyana's REDD+ Model*

Although it has been highly praised at the domestic, regional, and global levels, Guyana's REDD+ model has equally attracted criticisms from this wide spectrum of audiences. Critics have asked, how the government can be developing a model of REDD+ when there has been no explicit commitment on its part to curb deforestation. They point to a recent report that shows that actual deforestation has increased by 300 percent since the signing of the MOU in 2009.<sup>164</sup> Participation by civil society and other stakeholders in the design and implementation of REDD+ has also been heavily criticized. The government is seen as operating under a shroud of secrecy in the development of projects listed under the LCDS and has been criticised and as failing to effectively consult with relevant stakeholders.<sup>165</sup> The multi-stakeholder process is considered to be dominated by the president—the mastermind behind the LCDS and who has made it known that dissent is not welcome.<sup>166</sup> The government's delay in passing freedom of information legislation is also viewed as a tactic to deny full and effective participation.<sup>167</sup>

The actions of the Norwegian government in transferring funds into the REDD+ investment fund without independent monitoring and verifications have also been attacked. According to local experts and civil society, “this act on the part of Norway sent quite the wrong signals to a country with daily allegations in the independent press of corruption and malfeasance in government procurement and other expenditure.”<sup>168</sup>

These criticisms raise questions about whether Guyana's government is committed to developing a transparent and inclusive REDD+ model that will tackle climate change and bring development to Guyana, or whether the government is interested in REDD+ for its own profit. They also raise questions about the parties' commitment to safeguarding indigenous peoples' rights and ensuring their full and effective participation in the development of this model. These criticisms are waged by prominent individuals who are well represented in all spheres of local

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<sup>164</sup> Open Letter from Guyanese Civil Society to Minister Erik Solheim, *supra* note 134.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*; See also Janette Bulkan, “Notes: Annual Progress Report on REDD-Plus Enablers -2009-Norway and Guyana MOU” *Stabroek News* (4 May, 2010).

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

Guyanese society. If this is the type of treatment that is being meted out to prominent members of the society, then it raises the question, what would be the fate of already marginalized indigenous forest people in the REDD+ model?

## Chapter 3

### **REDD+ and its Implications for Indigenous Peoples: A *Global Perspective***

This chapter examines the implications that REDD+ could potentially have on indigenous peoples if their rights are not properly secured in the model's design and implementation. It will also consider indigenous peoples' views of REDD+ and their particular demands for rights in the context of this form of development, as well as explore the emerging normative framework being proposed by the international community, indigenous rights activist and scholars, to guide the development of REDD+ policies as they relate to safeguarding indigenous peoples' rights. It will conclude by arguing that this framework offers a solid normative basis for the development of REDD+ schemes, and should form the overarching guide for safeguarding indigenous peoples' rights when countries such as Guyana are developing their REDD+ models.

#### *REDD+: A Potential Threat to Indigenous Peoples*

At the global level, REDD+ is touted as a strategy that has the potential to produce benefits that go far beyond mitigation, including poverty reduction,<sup>169</sup> biodiversity protection,<sup>170</sup> and a range of other benefits.<sup>171</sup> However, it is increasingly recognized that those who live in and around forests might be particularly vulnerable to REDD+ activities.<sup>172</sup> Some 60 million indigenous people worldwide are entirely dependent upon forests for their livelihoods and sustenance.<sup>173</sup> REDD+ is being promoted and negotiated in a context where indigenous peoples

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<sup>169</sup> *Making REDD Work for the Poor: The Socio-economic Implications of Mechanisms for Reducing Emission from Deforestation and Degradation* (IUCN, 2007) at 3; Brown *et al.*, "How do we achieve REDD co- benefits and avoid doing harm?" in Arild Angelsen ed., *supra* note 111.

<sup>170</sup> Gullison *et al.*, *supra* note 102; Toby A. Gardner, *et al.*, "Prospects for tropical forest biodiversity in a human-modified world" (2009) 12 *Ecology Letters*, 561-582 at 561-562; Stuart L. Pimm *et al.*, "What is Biodiversity?" in Eric Chivian and Aaron Bernstein, eds, *Sustaining Life: How Human Health Depends on Biodiversity* (New York: Oxford University Press, 2008) at 18.

<sup>171</sup> Gullison *et al.*, *Ibid.*

<sup>172</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN HCHRCOR, 10<sup>th</sup> Sess., UN Doc. A/HRC/10/61, (2009) at para. 67.

This report notes that "Indigenous Peoples are particularly vulnerable to climate change and might also be affected by mitigation programmes such as large palm oil plantations and large hydroelectric projects or top-down conservation programmes."

<sup>173</sup> Frederic Achard, *Vital Forest Graphics: The Relationship between Indigenous Peoples and Forest* (United Nations Environmental Programme, 2009) at 14. Rodolfo Stavenhagen, *Report of Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN HRCOR, 4<sup>th</sup> Sess., UN Doc. A/HRC/4/32, (2007) at para.26.

face a lack of legal rights to forests. This is the situation even though they are stewards of vast portions of the world's forest, and have internationally recognized rights to forest lands and resources as guaranteed under international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples<sup>174</sup> and the Indigenous and Tribal Peoples Convention, 1989(ILO No. 169).<sup>175</sup> In many tropical forested countries, states fail to recognize the collective customary rights of indigenous peoples to their ancestral forests; in others, states only recognize a small portion of indigenous peoples' traditional lands as belonging to indigenous people, and these states legally define the remaining forests as "state land."<sup>176</sup>

The 2010 Forest Assessment Report by the UNFAO states that, despite changes in forest ownership and tenure in some regions, 80 percent of the world's forests remain under public ownership.<sup>177</sup> The report confirms that public ownership is predominant in all regions and sub-regions, except in Europe and the Russian Federation, where public ownership accounted for less than half (46 percent) of the forest area. Notable about the report is its findings that public ownership is by far the most common form of ownership in many of the countries with high forest cover, such as Brazil, the Democratic Republic of the Congo, and Indonesia. From a regional perspective, public ownership of forest is predominant in Africa (94.6 percent) and Asia (81.5 percent), while it is slightly more modest in North, Central (61.7 percent), and South America (75.3 percent).<sup>178</sup>

Not only do indigenous peoples in many states lack secure land tenure, they also lack important procedural rights such as the right to participate in decisions affecting their territories, and the right to give or withhold their free, prior and informed consent (FPIC) when proposing developmental activities that will directly impact indigenous livelihoods and cultures. Although these rights have emerged as important preconditions to developmental activities affecting

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<sup>174</sup> Arts. 18 and 19 'Declaration on the Rights of Indigenous Peoples', *supra* note 67.

<sup>175</sup> Arts. 14, 15, 16 and 17 Convention (NO.169) Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Office, Official Bulletin, vol. 72, series A, number 2.

<sup>176</sup> Griffiths, *supra* note 120 at 23. Cotula & Mayers, *supra* note 6 at 11.

<sup>177</sup> *Global Forest Assessment Report Main Report: FAO Forestry Paper* 163 (Rome: Food and Agricultural Organisation, 2010) at 21, 122-127.

<sup>178</sup> *Ibid.*

indigenous peoples and their territories,<sup>179</sup> states fail to give legal recognition to such rights, and even where they are recognized on paper, they are rarely followed in practice.<sup>180</sup>

In Suriname, for example, there are no national laws that recognize and protect indigenous rights. The Suriname government denies that indigenous peoples have rights to their lands and does not accept that they have the right to FPIC.<sup>181</sup> A similar situation exists in Peninsular Malaysia. Although the land rights of Malaysia's indigenous peoples, known collectively as Orang Asli (Aboriginal People), have been affirmed by the courts, they remain weakly protected in national legislation. The Malaysian government also does not accept that Orang Asli have the right to free, prior and informed consent.<sup>182</sup> In Peru, the principle of consent is only partially recognized in national laws. Specifically with respect to the establishment of protected areas, Peruvian law requires the free, prior and informed consent of communal property holders. However, the law only applies to communities that already have title to their lands; moreover, the establishment of protected areas prevents property owners from extending their territories and may allow the state to limit people's enjoyment of their properties. Furthermore, surveys of indigenous experiences in Peru show that, in practice, communities' rights have not been respected and consultation prior to the establishment of protected areas has been minimal or absent.<sup>183</sup> In Africa, governments deny that any particular group is indigenous, maintaining that all Africans are indigenous; in so doing, they fail to recognize the rights of those groups who have identified themselves as indigenous.<sup>184</sup> In his 2003 report, the former Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stavenhagen, notes that in many states even where there are formally recognized legal rights for indigenous peoples, in practice, these rights are not fully implemented, either in the courts by way of final adjudication determined by

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<sup>179</sup> Marcus Colchester & Maurizio Farhan Ferrari, *Making FPIC Work: Challenges and Prospect for Indigenous Peoples* (United Kingdom: Forest Peoples Programme, 2007) at 2.

<sup>180</sup> Viviane Weitzner, *Tipping the Power Balance: Making Free Prior and Informed Consent Work* (Ottawa: North-South Institute, 2011) at 8.

<sup>181</sup> Colchester & Ferrari, *supra* note 179 at 8.

<sup>182</sup> *Ibid.* at 9.

<sup>183</sup> *Ibid.*

<sup>184</sup> Statement by the Permanent Mission of Nigeria to the 24<sup>th</sup> session of the Working Group of Indigenous Populations held in Geneva, 31 July to 4 August 2006.



the judiciary or as a result of new legislative acts which in fact weaken or reduce previously legislated rights.<sup>185</sup>

This treatment of indigenous peoples is part of a wider culture of discrimination that has been practiced against indigenous peoples since the dawn of European colonization of the Americas and other parts of the globe. It continues to be reinforced by a dominant development paradigm that has shown little or no respect for indigenous peoples' distinct ways of living, their unique relationship with lands and forests, or their millennium-old cultures.<sup>186</sup> This paradigm is built upon the original social constructions and false labels attached to indigenous peoples that portray them and their cultures as inferior, backwards, primitive, and undeserving of basic human rights, including property rights.<sup>187</sup>

Without effective ownership of their lands and related rights, indigenous peoples have been vulnerable to both state and non-state actors. Under forest governance regimes, which are generally characterized as favouring elite and commercial interests, indigenous peoples have suffered immensely.<sup>188</sup> Case studies from across the developing world describe in chilling details the sufferings of indigenous peoples under forest governance regimes, including grave human rights abuses, evictions, forced relocation, dispossession, and even the use of military forces against them.<sup>189</sup>

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<sup>185</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN CHROR, 59<sup>th</sup> Sess., UN.Doc. E/CN.4/2003/90 at 8.

<sup>186</sup> *State of the World Indigenous Peoples*, *supra* note 7 at 72-76.

<sup>187</sup> See in this regard, Thomas Hobbes, *Leviathan; or the Matter, Forme, and Power of a Commonwealth Ecclesiastical and Civil*, ed. C.B. Macpherson (Baltimore: Penguin Books, 1968). He established the paradigm that indigenous peoples were savages who lived in a state of primal anarchy without culture, society or laws: See also, John Locke, *Two Treaties of Government*, (Cambridge: Cambridge University Press, 1998); J. Austin, *The Province of Jurisprudence Determined*, 2nd ed. (London: John Murray, 1832), and *Lectures of Jurisprudence*, 3 vols. (London: John Murray, 1861-3); David Hume, footnote to 'Of National Character', 1748, in *The Philosophical Works of David Hume*, Volume III (Bristol: Thoemmes Press, 1996) at 228; James Tully, *An Approach to Political Philosophy: Locke in Context* (Cambridge: Cambridge University Press, 1993); Emmerich de Vattel, *The Law of Nations* (New York: AMS Press, 1975).

<sup>188</sup> Frances Seymour, *supra* note 101 at 6.

<sup>189</sup> Marcus Colchester, "Conservation Policy and Indigenous Peoples" (2004) 7 *Environmental Science and Policy* 145-154; Michael M. Cernea & Kat Schmidt-Soltan, "Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement" (2006) 34:10 *World Development* 1808-1830; Michael Cernea, "The Risk and Reconstruction Model for Resettling Displaced Populations" (1997) 25:10 *World Development* 1509-1587; Michael Cernea, "Population Displacement inside Protected Areas: A Redefinition of Concepts in Conservation Policies" (2006) 14 *Policy Matters* 8-26; William M. Adams & John Hutton, "People, Parks and Poverty: Political Ecology and Biodiversity Conservation" (2008) 5:2 *Conservation and Society* 147-183. Arun Agrawal and Kent Redford, "Conservation and Displacement: An Overview" (2009) 7(1) *Conservation and Society* 1-10.

Many of these sufferings are not only the result of large-scale developmental activities such as mining, logging, or construction of hydroelectric dams,<sup>190</sup> but are also the result of what may be seen as somewhat benign activities, such as the establishment of national parks and protected areas and other paid environment service schemes, as well as similar REDD+ type projects that are geared towards conservation and sustainable forest management. Marcus Colchester's book, *Salvaging Nature*, highlights the many sufferings of indigenous peoples across the globe, which are a result of national parks and protected areas being established on their territories.<sup>191</sup> There are also a number of well-documented cases where indigenous peoples have been expelled from their territories in the processes of parks creation or conservation activities. In Botswana in 2002, the government forcefully evicted the G|wi and G|ana San communities from the Central Kalahari Game Reserve, which is their ancestral land.<sup>192</sup>

The Forest Peoples Programme<sup>193</sup> reviewed the extent to which indigenous peoples have benefited from paid environment schemes (PES), and found that that the impacts of PES on communities vary depending on the details on the different schemes. However in general, there have been few benefits for communities and small land holders.<sup>194</sup> Their work cites a study carried out by International Institute for Environment and Development (IIED) of the Climate Action Project in Noel Kempff Mercado National Park in Bolivia and the Rio Bravo Conservation and Management Area in Belize; the study found that benefits were captured by state agencies, local governments, and conservation NGOs rather than indigenous peoples and

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<sup>190</sup> For an overview of the impact of development projects on indigenous peoples' fundamental rights and freedoms, see: Rodolfo Stavenhagen, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN CHROR, 59<sup>th</sup> Sess., UN.Doc.E/CN.4/2003/90; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples* (United Kingdom: Earthscan, 2008); J. Kimerling, "Disregarding Environmental Law: Petroleum Development in Protected Areas and Indigenous Homelands in Ecuadorian Amazon" (1991) 14 Hastings International and Comparative Law Review 849-903.

<sup>191</sup> Colchester Marcus, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation* (United Nations Research Institute for Social Development, 1994); Marcus Colchester, "Conservation Policy and Indigenous Peoples", *supra* note 189; Michael Cernea & Kat Schmidt-Soltan, *supra* note 189; Michael Cernea, The Risk and Reconstruction Model for Resettling Displaced Populations", *supra* note 189; Michael Cernea, "Population Displacement inside Protected Areas", *supra* note 189; William M. Adams & John Hutton, *supra* note 189; Arun Agrawal and Kent Redford, *supra* note 189.

<sup>192</sup> Statement by the Working Group on Indigenous Minorities in South Africa (WIMSA) to the 3<sup>rd</sup> session of the Permanent Forum on Indigenous Issues, United Nations Headquarters, New York, 2004; Statement to the 6<sup>th</sup> session of the Permanent Forum on Indigenous Issue , United Nations Headquarters, New York, 2007. Online: <<http://www.docip.org/Online-Documentation.32.0.html>>.

<sup>193</sup> Griffiths, *Seeing REDD?*, *supra* note 120.

<sup>194</sup> *Ibid.* at 31.

local communities.<sup>195</sup> Developing REDD+ within the context where forest governments remain opposed to indigenous peoples' rights has thus raised concerns and fears that such a program will have devastating consequences for indigenous peoples who already exist in a marginalized state.

### *Land Grabs, Conflicts, and Violation of Customary Rights*

Proponents of indigenous rights are concerned that, without adequate protections, indigenous people and local communities' livelihoods, access to resources, and other rights (such as cultural rights) will be disrupted where deforestation is substantially reduced or halted as part of climate change mitigation strategies.<sup>196</sup> Indigenous peoples face the risk that governments will interfere with their rights when zoning forests to create protected areas, biological corridors, forest reserves, and sustainable forest management zones. Governments might then grant state-authorized forest concessions to manage these forests, which would prohibit community use of forestry resources, or evict indigenous peoples and communities from parks or protected areas,<sup>197</sup> while also recentralizing forest governance.<sup>198</sup>

There is also concern that assigning a substantial monetary value to forests may create incentives for governments to ignore longstanding territorial claims by indigenous peoples.<sup>199</sup> There is also fear that this could trigger land grabs and theft by governments, private corporations, and elites seeking to maximize their income from REDD+, resulting in serious dispossession of indigenous peoples.<sup>200</sup> As summed up by Friends of the Earth International:

In many countries, Governments and others are likely to ignore the customary and territorial rights of Indigenous Peoples, as they seek to protect an increasingly valuable resource from 'outside' interference, violently or otherwise. The simple fact that forests are becoming an increasingly valuable commodity means that they are more likely to be wrested away from local people. Previous experiences, with the Clean Development Mechanism, voluntary carbon offset projects and payments for environmental services schemes, indicate that there is little reason for

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<sup>195</sup> P.H. May *et al*, *Local Sustainable Development Effects of Forest Carbon Projects in Brazil and Bolivia* (London: Environmental Economics Programme (IIED), 2004), cited in Griffiths, *supra* note 120 at 31.

<sup>196</sup> Griffiths, *supra* note 120 at 10.

<sup>197</sup> Rosemary Lyster, "REDD+, Transparency, Participation and Resource Rights: The Role of the Law" (2011)14 *Environmental Science and Policy* 118-126.

<sup>198</sup> Phelps *et al*, *supra* note 101.

<sup>199</sup> Griffiths, *supra* note 120 at 10.

<sup>200</sup> Cotula & Mayers, *supra* note 6 at 3.

optimism, especially for already marginalized communities living in the forests.<sup>201</sup>

Sadly, there are signs that REDD+ might already be producing these consequences in other countries. In Papua New Guinea, it has been reported that an indigenous leader was kidnapped and forced at gun point to sign over the carbon rights of his tribe's forest.<sup>202</sup> Similarly, in July 2008, the Kenyan government launched an aggressive campaign to evict people, including the Ogiek, deemed to be living "illegally" in the Mau Forest Complex, ostensibly in order to protect Kenya's forests.<sup>203</sup> The action was taken in response to concern about the loss of forest cover in Kenya and the resulting wide-ranging negative impacts, including drought, loss of livelihood, and reduced access to basic environmental services such as clean water. The Mau Forest is one of five main water catchment areas in Kenya, feeding Lakes Victoria, Nakuru, and Natron, and supporting the ecosystems and livelihoods in the Maasai Mara National Park and the Serengeti. However, according to Survival International, the main cause of loss of forest cover is not due to the activities of the Ogiek and other indigenous people living there, but rather the more recent encroachment of purely commercial interests, including logging and clear cutting for human settlement and agriculture.<sup>204</sup> Forest Peoples Programme's April 2011 newsletter notes that in Cameroon, pilot REDD+ schemes routinely fail to respect indigenous peoples' property rights.<sup>205</sup>

Following the agreement on REDD+ at COP 13, the financial sector began to take a keen interest in REDD+, specifically in the inclusion of REDD+ credits in carbon markets. Huge corporations, such as Shell, and conservations organizations, such as Conservation International and Canopy Capital, are engaging in the establishment of REDD+ projects. Shell, which is

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<sup>201</sup> *REDD Myths: A Critical Review of Proposed Mechanism to Reduce Emissions from Deforestation and Degradation* (Friends of the Earth International, 2008) at 15.

<sup>202</sup> Chris Lang, "REDD and violence against Indigenous peoples in Papua New Guinea" *Independent REDD Monitor* (15 Jan 2010) online: Redd Monitor, [http://www.redd-monitor.org/2010/01/15/redd-and-violence-against-indigen\)ous-leader-in-papua-new-guinea/](http://www.redd-monitor.org/2010/01/15/redd-and-violence-against-indigen)ous-leader-in-papua-new-guinea/).

<sup>203</sup> Ogiek Cultural Initiative Programme (OCIP) & Ogiek Rural Integral Programme (ORIP). *Statement to the Working Group on Indigenous Populations*, United Nations, Geneva, 2005, online: DOCIP< <http://www.docip.org/Online-Documentation.32.0.html>>.

<sup>204</sup> Survival International Report, *The Most Inconvenient Truth of All: Climate Change and Indigenous People* (United Kingdom: Survival International, 2007) at 7-8.

<sup>205</sup> *E-Newsletter* (April 2011), online: Forest Peoples Programme< <http://www.forestpeoples.org/enewsletters/fpp-e-newsletter-april-2011>>.

infamous for its association with the murder of Ogoni People and environmental destruction in Nigeria's Niger Delta, has now partnered with Gazprom and the Clinton Foundation to fund the landmark REDD+ Rimba Raya project on 100,000 hectares (250,000 acres) in the province of Central Kalimantan in Indonesia.<sup>206</sup> According to Reuters, the Rimba Raya project marks "a milestone" in the development of a global market in forest carbon credits. Shell's REDD+ carbon-offset project could be quite a significant money maker for the company. Reuters calculates that: "At about \$10 a credit, that means about \$750 million over 30 years."<sup>207</sup> Large conservation organizations such as The Nature Conservancy, Flora and Fauna International, Conservation International, and Canopy Capital are also engaged in developing and managing many new REDD+ projects.<sup>208</sup> It is likely that these organizations could benefit financially from REDD+ projects. In Guyana, for example, London-based Canopy Capital recently launched a project in the Iwokrama rainforest reserve, and the company is said to be "working on a number of tradable investment products in an attempt to monetarize the services of the 371,000 hectare forest, such as rainfall protection, water resource preservation and conservation of native biodiversity."<sup>209</sup> In relation to REDD+ and forests' carbon sequestration services, Canopy Capital's Managing Director, Hylton Murray-Philipson, has commented, "One should take away the romance of it, forget about the indigenous people, the birds and the bees and the butterflies. ... Think of it like a utility. ... If you don't pay your bill, eventually you'll get cut off."<sup>210</sup>

These are all examples of how corporations and conservation organizations can use REDD+ schemes as a form of "green-washing" in order to profit in the name of conservation. This trend could have major implications for indigenous peoples, who could see their lands and territories being taken away and human rights violated as the demand for forested lands spirals.

#### *Indigenous Peoples' Opposition to REDD+*

At the global level, indigenous peoples' response to REDD+ is mixed. Although they remain at the frontlines of vulnerability to climate change and deforestation, some indigenous

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<sup>206</sup> Fogarty & Creagh, *supra* note 119.

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> *REDD Myths*, *supra* note 201 at 15.

<sup>210</sup> *Ibid.*

peoples are overwhelmingly opposed to REDD+. The International Forum of Indigenous Peoples on Climate Change (IFIPCC) has declared that:

REDD+ will not benefit Indigenous Peoples, but in fact, it will result in more violations of Indigenous Peoples' Rights. It will increase the violation of our human rights, steal our land, cause forced evictions, prevent access and threaten indigenous agriculture practices, destroy biodiversity and culture diversity and cause social conflicts. Under REDD+, States and Carbon Traders will take more control over our forests.<sup>211</sup>

According to indigenous rights activist Tom Goldtooth, "carbon trading and carbon offsets are a crime against humanity and creation. ... The carbon market insanity privatizes the air and sell it to criminals like Shell so they can continue to pollute and destroy the climate and our future rather than reducing their emissions at source."<sup>212</sup> Indigenous peoples also view REDD+ as a scheme that will violate their human rights and threaten cultural survival. According to Goldtooth, "Most of the forests of the world are found in Indigenous Peoples' land, REDD+ type projects have already caused land grabs, killings, violent evictions and forced displacement, violations of human rights, threats to cultural survival, militarization and servitude."<sup>213</sup>

On the other hand, many indigenous peoples have expressed their interest in participating in REDD+ activities, but have emphasized that REDD+ schemes must respect their rights to forest. In April 2008, the seventh session of the United Nations Permanent Forum on Indigenous Issues (UUNPFII) recommended that:

The renewed political focus on forests stimulated by current policy debates on reducing emissions from deforestation and degradation (REDD) under the United Nations Framework Convention on Climate Change be used towards securing the rights of indigenous peoples living in forests and rewarding their historical stewardship role and continuing conservation and sustainable use of forests. According to the principle of free, prior and

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<sup>211</sup>Statement by the International Forum of Indigenous Peoples on Climate Change (IFIPCC) on 'Reduced Emissions from Deforestation and Forest Degradation' (REDD) agenda item at the UNFCCC climate negotiations -The International Forum of Indigenous Peoples on Climate Change (IFIPCC) at the 13th Session of Conference of the Parties to the UNFCCC SBSTA 27, (Nov, 2007).

<sup>212</sup>Tom Goldtooth, *Carbon Markets Violate Indigenous Peoples' Rights and Threaten Cultural Survival* (Indigenous Environmental Network, 2010).

<sup>213</sup> *Ibid.*; see also, Madhusree Makerjee, "Conflicted Conservation: When Restoration Efforts are Pitted Against Human Rights- Saving Earth might mean Trampling Indigenous Societies" *American Scientific Magazine* (27 August 2009)-Marcus Colchester, has been quoted as commenting: "We see a risk that the prospect of getting a lot of money for biodiversity could lead to indigenous peoples' concerns falling by the wayside."

informed consent, indigenous peoples must not be excluded from, and should be centrally involved in and benefit from, deciding forest policies and programmes at all levels that deliver justice and equity and contribute to sustainable development, biodiversity protection and climate change mitigation and adaptation.<sup>214</sup>

The Forum also noted that:

new proposals for avoided deforestation or reduced emissions from deforestation must address the need for global and national policy reforms and be guided by the United Nations Declaration on the Rights of Indigenous Peoples, respecting rights to land, territories and resources; and the rights of self-determination and the free, prior and informed consent of the indigenous peoples concerned.<sup>215</sup>

These concerns raised by indigenous peoples are legitimate. Indigenous peoples have good reasons to be concerned about REDD+; they are often the ones who suffer the bulk of the consequence of poor policy decisions, while governments and corporations enjoy the benefits. The international community and governments keen on promoting REDD+ must consider indigenous peoples' demands and adopt appropriate policy measures and laws to adequately safeguard indigenous rights in REDD+.

### **Adopting a Human Rights–Based Approach to REDD+**

There is growing consensus among members of the international community that climate change mitigation policies, including REDD+, must develop in accordance with a human rights–based approach.<sup>216</sup> As the Office of the High Commissioner for Human Rights (OHCHR) notes,

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<sup>214</sup> UNPFII, *Permanent Forum on Indigenous Issues: Report on the Seventh Session (21 April–2 May 2008)* E/C.19/2008/13 at paragraph 44.

<sup>215</sup> *Ibid.* at para. 45. See also, the 2009 Anchorage Declaration which emphasised that: “All initiatives under Reducing Emissions from Deforestation and Degradation (REDD) must secure the recognition and implementation of the rights of Indigenous Peoples, including security of land tenure, recognition of land title according to traditional ways, uses and customary laws and the multiple benefits of forests for climate, ecosystems, and peoples before taking any action.”

<sup>216</sup> William D Sunderlin, Ann M. Larson and Peter Cronkleton, “Forest tenure rights and REDD+: From inertia to policy solutions” at 39 in Arild Angelsen ed., *Realising REDD+: National Strategy and Policy Options* (Indonesia: CIOFR, 2009) at 140; Anne M. Larson, “Forest Tenure Reform in the Age of Climate Change: Lessons for REDD+” (2011) 21 *Global Environmental Change* 540-549; Forest Tenure in the IUCN REDD Programme Framework Document (Geneva: UN REDD Programme, 2008); A Report by the World Conservation Union (IUCN) argues that secure rights to resources, among other things are essential for the ability of local peoples to respond and adapt to climate change. Without these “the resilience of indigenous and traditional peoples may decrease and the

a human rights–based approach is a conceptual framework that is normatively based on international human rights standards and is operationally directed towards promoting and protecting human rights. It seeks to analyze obligations, inequalities, and vulnerabilities, and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights. Under a human rights–based approach, plans, policies, and programs are anchored in a system of rights and corresponding obligations established by international law. This helps to promote sustainability, empowering people themselves (rights-holders), especially the most marginalized, to participate in policy formulation and to hold accountable those who have a duty to act (duty-bearers).<sup>217</sup>

In the context of REDD+, policies must develop in a framework that respects and protects indigenous peoples in accordance with prevailing human rights standards on indigenous people’s rights. Indeed, in its 2009 Report, the OHCHR observed that “indigenous communities fear expropriation of their lands and displacement in connection with REDD initiatives,”<sup>218</sup> and it concluded that indigenous peoples require special attention to ensure that their rights are respected.<sup>219</sup>

The Cancun Agreement adopted at the Sixteenth Conference of the Parties (COP 16) in November 2011, has also emphasized that, when parties undertake REDD+ activities, they should respect the knowledge and rights of indigenous peoples and members of local communities by taking into account relevant international obligations, national circumstances, and laws, and by noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples. Parties must also ensure the full and

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threshold beyond which a system may not be able to adopt environment change may be exceeded.” Mirjam Macchi et al, *Indigenous and Traditional Peoples and Climate Change* (Switzerland: IUCN, 2008).

<sup>217</sup>Office of the United Nations Office of the High Commissioner for Human Rights. *Applying a Human Rights Based Approach to Climate Change Negotiations, Policies and Measures—What is a human right-based approach?*, online OHCHR< <http://www2.ohchr.org/english/issues/climatechange/index.htm>>. ; *Report of the Office of the United Nations High Commissioner for Human Rights*, *supra* note 172 at paras 64-99.

<sup>218</sup> *Ibid.* at para. 68.

<sup>219</sup> *Ibid.* at para. 94.



effective participation of relevant stakeholders, in particular indigenous peoples, and local communities, in all REDD+ activities.<sup>220</sup>

### *Indigenous Peoples' Rights under International Law*

One of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as special subjects of concern.<sup>221</sup> This development illustrates a significant doctrinal shift within the international legal discourse. In fact, international law, as it emerged from a Eurocentric world view, has been inherently opposed to indigenous peoples' rights until recently. As James Hopkins notes, in the chronology and development of international law, its normative structure and overarching themes reflected the colonial aspirations of the European powers and set the stage for subsequent changes to the governing framework between nation-states and the indigenous peoples who collided with European mercantilist expansion over lands and natural resources.<sup>222</sup> However, from the very beginning, when European nations plundered indigenous peoples' lands and carried out their mass murder in the New World, concerned European theologians and jurists questioned the morality and legality of the onslaught, basing their theories on European principles of natural law. Prominent theorist Francisco de Vitoria maintained that the indigenous peoples of Central and South America were humans with souls, that they were the true owners of their lands, and that they had the legal rights requiring protection by the discovering power.<sup>223</sup> Further support came from Hugo Grotius, a father of public international law, who affirmed the argument of Vitoria and similarly rejected the theory of discovery and colonialists' claims that indigenous territories were devoid of humans. Grotius argued that all lands inhabited by humans, despite

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<sup>220</sup> Cancun Agreement, *supra* note 109 at Annex 1 para. 2 (a) and (b)

<sup>221</sup> Fergus Mackay, *Briefing Paper on the Rights of Indigenous Peoples in International Law*. (Paper presented to the Guyana Constitutional Commission, 1999), unpublished; RL Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law" (1994) 7 *Harvard Human Rights Journal* 33. In this article, he traces the development of international law from a point where indigenous were objects as such to the point where they are now firm subjects of international law; James Anaya & Robert A. Williams, "The Protection of Indigenous over Land and Resources Under the Inter-American System" (2001) 14 *Harvard Human Rights Journal* at 33.

<sup>222</sup> James Hopkins, "The Inter- American System and the Rights of Indigenous Peoples" in Benjamin J. Richardson, Shin Imai & Kent McNeil eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford and Portland, Oregon: Hart Publishing, 2009) at 140.

<sup>223</sup> Francisco de Vitoria, *De indiset de ivre bellirelectionses* (Classics in International Law Series, 1971), cited in James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2004) at 16.

their cultural and religious inclinations, should not be treated as subject to discovery by foreign nations.<sup>224</sup>

Despite these strong arguments for the respect of indigenous peoples' sovereignty as nations in their own right, in order to justify their continued genocide and plundering of indigenous peoples lands, and to deny indigenous peoples' sovereignty over their territories, European nations relied upon theories of discovery, terra nullius, and racist stereotypes of indigenous peoples founded upon myths of savagery, barbarism, and the so-called uncivilized nature of indigenous peoples.<sup>225</sup> With the rise of positivism in the 19<sup>th</sup> century, international law shed whatever natural law attributes it contained, and it became a legitimizing force for European colonialism.<sup>226</sup> As James Anaya notes, "international law changed into a state centered system, strongly grounded in a western world view, it developed to facilitate colonial patterns, promoted by European states and their offspring, to the detriment of indigenous peoples."<sup>227</sup> The unilateral development of international law precluded the participation of indigenous peoples and by extension excluded indigenous rights. States, on the other hand, both shaped the rule of international law, and enjoyed rights under it largely independent of any natural law

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<sup>224</sup> Hugo Grotius, *The Law of War and Peace Classics of International Law* edited and translated by Francis W. Kelsey (Washington, DC: Carnegie Endowment for International Peace, 1925) at 550. In his famous debate with Las Casa Valladolid in 1550-51, Spanish jurist Juan Gines de Spulveda, invoked Aristotle's doctrine that some people are 'natural slaves' to justify the conquest and domination of the Indians in South America by the Spanish.

<sup>225</sup> Robert A. Williams Jr., *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990) discusses the legal theories which were used to justify the Western conquest of indigenous peoples. He derives these from the practices of the Catholic Popes, the medieval crusades against Islam, and the concept of Just War. Arrogating to themselves the care of all humans on the Earth, the Popes eventually believed they were capable of dividing all non-Christian territories and peoples among the Catholic faithful of Portugal and Spain. Conquest and slavery were justified by the fact that the indigenous peoples were not Christians. This was ritualized in the Requerimiento, intended to give the natives the chance to adopt Christianity and avoid conquest. It was turned into a sham to allow conquest. Its early unchecked development with its undeniable result for the conquistadores of personal and national wealth, encouraged later imperialist adventures by the English and French in the Americas and Asia. Another doctrine which was recently abandoned by the Australian Supreme Court in the Mabo Decision (*Mabo and others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014) is that of *Terra Nullius*. Under this doctrine, empty, unsettled or unpopulated land could be claimed by anyone who would settle and develop it. South Africa and Australia have been the champions of this doctrine. See also, Thomas Hobbes' 'State of Nature' theory in *Leviathan; or the Matter, Forme, and Power of a Commonwealth, Ecclesiastical and Civil* (1651), which established the paradigm that indigenous peoples were savages who live in a state of primal anarchy without culture, society or laws. See also, the joint philosophies of John Locke and Swiss National Emmerich de Vattel, which are argued as philosophies which directly supports European Colonialism and the dispossession of Indigenous peoples' lands. Leading scholar, James Tully, has argued that Locke's theory suggests a brutally legalistic rationale for England's theft of a continent from its native owners.

<sup>226</sup> James Anaya (2004), *supra* note 223 at 26.

<sup>227</sup> *Ibid.*

considerations. It followed that states could create doctrines to affirm and protect their claims over indigenous territories as a matter of international law and treat the indigenous inhabitants according to domestic policies, shielded from uninvited outside scrutiny of international law itself.<sup>228</sup>

With significant shifts in the normative order in the 20<sup>th</sup> century, international law underwent a massive ideological change, and moved away from its state-centered positivism, towards a more humanitarian outlook based upon precepts of world peace and concern for humanity. This shift, in turn, provided the fertile ground for social forces to defend natural law principles and reverse the direction of international law where it concerned indigenous peoples. Since the latter half of the 20<sup>th</sup> century, the international legal regime has steadily moved in the direction of greater recognition of the rights of indigenous peoples.

Today, the rights of indigenous peoples are recognized in a plethora of international instruments including the following: the Rio Declaration on Environment and Development,<sup>229</sup> Agenda 21,<sup>230</sup> The United Nations Framework Convention on Climate Change,<sup>231</sup> the Convention of Biodiversity,<sup>232</sup> the Forest Principles, UNDRIP,<sup>233</sup> CERD<sup>234</sup>, and ILO Convention 169.<sup>235</sup> Indigenous scholars such as James Anaya have made the argument that

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<sup>228</sup> *Ibid.*; See James Westlake, *Chapter on the Principles of International Law* (1984), cited in James Anaya (2004), *supra* note 223 at 27. He provides the rationale for such exclusion: when the people of the European race come into contact with the American or African tribes, the prime necessity is a government under the protection of which the former may carry on a complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contest between different European powers for supremacy of the same soil and which may protect the natives in the enjoyment of security of well-being at least not less than they enjoyed before the arrival of the strangers. Can natives furnish such a government, or can it be looked for by the Europeans alone? In the answer to this, lies for international law, the difference between the civilisation and the want of it. The inflow of the white race cannot be stopped where there is land to cultivate, or to be mined, commerce to be developed, curiosity to be satisfied. If any fanatical admirer of savage life argued that the white ought to be kept out, he would only be driven to the same conclusion by another route. For a government on the spot would be necessary to keep them out. Accordingly, international law has to keep such natives as uncivilized.

<sup>229</sup> Rio Declaration on Environment and Development (1992) 33ILM 874, Principle 22.

<sup>230</sup> UN Conference on Environmental Development (UNCED) Agenda 21 (UNCED 1993) ch 26.

<sup>231</sup> The United Nations Framework Convention on Climate Change, adopted 9 May 1992, 1771 UNTS 165, entered into force 21 March 1994.

<sup>232</sup> Convention on Biological Diversity, *supra* note 61.

<sup>233</sup> 'Declaration on the Rights of Indigenous Peoples', *supra* note 67.

<sup>234</sup> Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 58.

<sup>235</sup> Convention (NO.169) Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 175.

these rights, or at least some of them, have achieved the status of customary international law and are legally binding except towards persistent objectors.<sup>236</sup>

### *The Collective Nature of Indigenous Rights in International Law*

Indigenous peoples' rights are collective rights, rights that apply to indigenous people as a unit rather than to the indigenous individual to the exclusion of the collective. This is not to say that individual rights are not part of indigenous rights in international law; they certainly are. Rather, indigenous rights apply both to indigenous peoples and indigenous individuals. Collective rights have been described as "an inherent and essential element of indigenous rights."<sup>237</sup> While human rights law has traditionally been concerned with the rights of individuals, international consensus has developed that human rights can also adhere to collectivities, particularly in the case of indigenous peoples. Sanders defines collectivities as "groups that have goals that transcend the ending of discrimination against their members, for their members are joined together not simply by external discrimination but by an internal cohesiveness. Collectivities seek to protect and develop their own particular cultural characteristics."<sup>238</sup> For indigenous peoples, humans are inherently social beings. As social beings, people never exist in isolation from others; rather, each human being is born into a closely linked and integrated network of family, kinship, and social and political relations. One's clan, kinship, and family are part of one's personal identity, and one's rights and responsibilities exist only within the framework of such familial, social, and tribal networks.<sup>239</sup> Indigenous peoples therefore think of their rights in collective terms.<sup>240</sup>

### *Indigenous Peoples' Rights Applicable to REDD+ Policies*

The rights most applicable to the issues indigenous peoples face within the context of REDD+ are the rights to self-determination and property and, procedural rights such participation and free, prior and informed consent. Recognition and protection of these rights are

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<sup>236</sup>James Anaya, *Indigenous Peoples in International Law* (New York/Oxford: OUP, 1996) at 49-58.

<sup>237</sup> (UNWGIP 1988. Discrimination against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its Sixth Session. UN Doc. E/CN.4/Sub.2/1988/25. See also UNWGIP (1996). Aboriginal and Torres Strait Islander Commission: a Definition of 'Indigenous People'? UN DOC.E/CN.4/Sub.2/AC.4/2/Add.1.

<sup>238</sup>D. Sanders, "Collective Rights" (1991)13 Human Rights Quarterly 368 at 369.

<sup>239</sup> Robert N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights" (1990) 32:4 Arizona Law Review 739 at 742.

<sup>240</sup> *Ibid.*

necessary to prevent harm to indigenous peoples that might result from REDD+ programs and activities.

### *The Right to Self- Determination*

International law recognizes that indigenous peoples have the right to self-determination. This is a fundamental principle of international law which recognizes that human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality.<sup>241</sup> Article 3 of the UNDRIP which is an unqualified adoption of the basic formula of self-determination in the UN Human Rights Covenants<sup>242</sup> affirms that:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

At outset however, it must be emphasized that the meaning of this right as it applies to indigenous peoples remains somewhat unclear: It has different meanings for indigenous and non-indigenous peoples.<sup>243</sup> It is also controversial and has aroused apprehension by governments for fear that the right to self- determination, if applied to indigenous peoples in its true sense, could lead to challenges to the territorial integrity of the states in which indigenous peoples reside, resulting in secession. Current international practice and literature on the right to self-determination, and its application to indigenous peoples, indicates that a modified version of the right applies to indigenous peoples:<sup>244</sup> An internal version of the right, closely related to autonomy, applies to indigenous peoples. This is supported by articles 4 and 46 (1) of the UNDRIP:

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<sup>241</sup> Anaya & Williams, *supra* note 221.

<sup>242</sup> See Art.1 ICCPR, *supra* note 56; Art. 1 ICESCR, *supra* note 57.

<sup>243</sup> See Shin Imai, “Indigenous Self-determination” Benjamin J. Richardson, Shin Imai & Kent McNeil eds., *supra* note 222. He discusses the difference between indigenous and non-indigenous conceptualization of self-determination, citing John Burrows’ view of what self- determination implies for indigenous peoples. According to Burrows, “the term self- determination does not require a legal or technical definition because I do not refer to self-government as an abstract futuristic institution. I identify self-determination with particular events in which our people have exercise specific instances of control in their internal and external relationships.” See John Burrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self- Government” (1992) 30 Osgoode Hall Journal 291 at 294.

<sup>244</sup> See, Christian Tomuschat ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function. And;

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

This indicates that the right to self-determination recognized by international law does not favour the formation of new states or secession by indigenous peoples;<sup>245</sup> rather, it is an attempt to accord greater autonomy to indigenous peoples over their own internal affairs within the states in which they live. This gives indigenous peoples an opportunity to control their own destinies by having greater control over their own political, cultural and economic institutions, as well as, their ancestral land and resources.

#### *The Right to Self-Determination and its Implications for REDD+*

In the context of REDD+ policies, respecting indigenous peoples' self-determination requires respecting indigenous peoples' right to decide whether they want to freely participate in REDD+ activities.<sup>246</sup> REDD+ activities must not be forced upon indigenous peoples and their territories. Indigenous property rights, where secured, must be respected at all times, and where land tenure remains unclear and contested, measures must be taken to secure such rights.<sup>247</sup> REDD + Policies must respect indigenous governance systems, institutions and knowledge-based systems; REDD+ policies should seek to work with existing structures and refrain from creating new community-level institutions.<sup>248</sup> Indigenous peoples must also have a voice in REDD+: They should be able to effectively participate in all levels of REDD+ development.<sup>249</sup>

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<sup>245</sup> UN Committee on the Elimination of Racial Discrimination, whose General recommendation XXI (48) for instance has evoked the Declaration on Friendly Relations, concluding that international law has not recognized a general right of peoples unilaterally to declare secession from a State.

<sup>246</sup> Kari-Oca Declaration II.

<sup>247</sup> Griffiths, *supra* note 120 at 33.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Infra*, see discussion on the right to participate in REDD+ activities on pages 60-63.

Finally, REDD+ policies must respect indigenous peoples' right to Free Prior and Informed Consent in accordance with their own representative institutions.<sup>250</sup>

### *The Right to Property*

International law recognizes indigenous peoples' rights to their ancestral lands, territories, and resources. So important is this right that it has found a place in all leading international instruments that are relevant to indigenous peoples.<sup>251</sup> Article 26 of the UN Declaration on the Rights of Indigenous Peoples provides the following:

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

The need to secure indigenous peoples' right to property is based on the special relationship indigenous and tribal peoples have with their territory and the need to protect their right to that territory not only as a property right, but also in order to safeguard their physical and cultural survival. In the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (the *Awas Tingni* case),<sup>252</sup> the Inter-American Court of Human Rights described the relationship between indigenous peoples and their lands as follows:

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<sup>250</sup>Infra, see discussion on the right to FPIC on pages 63-69.

<sup>251</sup> See ILO Convention No. 169 *supra* note 175 Arts 13-8; American Convention on Human Rights, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; S. Treaty Doc. No. 95-21, 9 I.L.M. 99(1969) Art 21(1). The United Nations Committee on the Elimination of Racial Discrimination, in interpreting the requirements of the fundamental norm of non-discrimination embraced by the Convention, has admonished states to take specific steps to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”

<sup>252</sup> Case of The Mayagna (Sumo) Awas Tingni Community, Judgment of August 31, 2001. Series C No. 79.

Among Indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of Indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For Indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>253</sup>

This case indicates that international standards recognize that indigenous peoples' right to property is based upon a residual title that predates colonial intervention and, therefore, exists independent of a grant from the state. In other words, indigenous peoples' right to own their ancestral lands and resources does not stem from a grant of state, but rather from their traditional occupation of these lands, which extends centuries before the arrival of Europeans to their territories. Such ownership is traced to their traditional land tenure systems and customary legal systems, whatever forms they may take.<sup>254</sup>

The right to property is also linked to other fundamental human rights, such as the right to culture, life, and the right to food. The denial of the right to land could essentially mean a denial of these important human rights.

### *The Right to Culture*

Article 27 of the International Covenant on Civil and Political Rights protects minorities' right to culture. It establishes that, "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture." The HRC has explicitly recognized that indigenous people's ways of life are often intimately connected to the land on which they live. In *Kitok v. Sweden*,<sup>255</sup> the HRC reasoned that the right to enjoy their culture might "consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."

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<sup>253</sup> *Ibid.* at para. 149.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Kitok vs. Sweden, Report of the Human Rights Committee*, (1988) 43 UN GAOR Supp. (No.40) at 221, UN Doc. A/43/40; Human Right Committee, *General Comment No. 23 supra* note 64.



That right may include such traditional activities such as fishing or hunting, and the right to live in reserves protected by law.<sup>256</sup> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.<sup>257</sup>

### *The Right to Life*

The right to life is the most fundamental of human rights and is guaranteed by a number of international human rights instruments.<sup>258</sup> Article 3 of the 1948 Universal Declaration on Human Rights (UNDHR) states, “Everyone has the right to life.” The American Declaration of the Rights and Duties of Man (1948) likewise provides that “Every human being has the right to life.” Although these declarations are non-binding, they were part of standard setting by the United Nations and the Organization of American States and are considered to reflect customary international law.<sup>259</sup> In addition to being protected under customary international law, the right to life is guaranteed by various treaties. For example, the International Covenant on Civil and Political Rights (1966) states in Article 6 that “Every human being has the inherent right to life. This right shall be protected by law. No person shall be arbitrarily deprived of his life.”

The UN Human Rights Committee has confirmed that the right to life should not be interpreted narrowly.<sup>260</sup> The right to life means more than just physical survival. The Indian Supreme Court has held that the right to life includes “all that gives meaning to a man’s life including his tradition, culture and heritage and protection of that heritage in its full measure.”<sup>261</sup> With respect to indigenous peoples, their right to life depends on their continuing relationship with the land. The link between land and life was also recognized in *Cal v. The Attorney General*

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<sup>256</sup> General Comment No. 23, *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> Article 3 of the 1948 Universal Declaration on Human Rights (UNDR) states that “Everyone has the right to life”, Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art 3.

<sup>259</sup> Bruno Simma & Alston Philip, “The Sources of Human Rights Law: Customs, Jus Cogens and General Principles” (1992) 12 Aust. Y.B. INT’L L.82; For a general discussion on the normative significance of the UDHR see, Louis Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 Am U.L.Rev.1; Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995) 25 GA.J. INT’L and Comp. L 287.

<sup>260</sup> General Comment No. 6: The Right to Life (art. 6): 04/30/1982.

<sup>261</sup> *Ramsharan Autyanuprasi v Union of India* 1989 Supp (1) SCC 251, 256: AIR 1989 SC 549.

of *Belize and the Minister of Natural Resources and the Environment*, in which Chief Justice Conteh held that, without legal protection of the Maya rights to and interests in their customary land, the Maya enjoyment of their right to life would be seriously compromised.<sup>262</sup> The Inter-American Court of Human Rights has also recognized that the failure to respect land rights has a negative effect on indigenous peoples' right to life because it deprives the community of "access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and practice traditional medicine to prevent and cure illnesses."<sup>263</sup>

### *The Right to Food*

The right to food is recognized in a plethora of international human rights instruments,<sup>264</sup> but the International Covenant on Economic, Social and Cultural Rights deals more exclusively than any other instrument with this right. Pursuant to article 11 (1) of the Covenant, State parties recognize "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Pursuant to article 11(2), State parties recognize that more immediate and urgent steps may be needed to ensure the "fundamental right to freedom from hunger and malnutrition." The human right to food is of crucial importance for the enjoyment of all rights.

The Committee on Economic, Social and Cultural Rights has affirmed that the right to food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies at both the national and international levels, oriented to the eradication of poverty and the fulfillment of all human rights for all.<sup>265</sup> According to the CESCR General

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<sup>262</sup> Supreme Court of Belize, A.D. 2007.

<sup>263</sup> *Case of the Indigenous Community Yakye Axa*, Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005 Series C No. 125.

<sup>264</sup> Art. 25 Universal Declaration on Human Rights, *supra* note 258; Arts 23 (2) (c) and 25 (3) Convention on the Rights of the Child, *supra* note 59 ; Art 12 (2) Convention on the Elimination of All forms of Discrimination Against Women Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33(1980).

<sup>265</sup> General Comment No. 12 "The right to adequate food" (Art.11), (5 December 1999), UN Doc. E/C.12/1999/5. Para 4.

Comment No.12, the normative content of the right to food consist of two main elements: “The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such foods in ways that are sustainable and that do not interfere with the enjoyment of other human rights”<sup>266</sup>

With regard to indigenous peoples, Article 11 of the ICESCR applies to everyone, including indigenous peoples. The committee has also emphasized that specially disadvantaged groups my need special attention and sometimes priority consideration with respect to accessibility of food. This includes indigenous peoples whose access to their ancestral lands may be threatened.<sup>267</sup>

### *The Right to Health*

Article 12 of the ICESCR recognizes the right to the “highest attainable standard of physical and mental health.”<sup>268</sup> The right to health is also widely protected in other international and regional instruments.<sup>269</sup> The CDESCR considers this right as indispensable for the enjoyment of other human rights.<sup>270</sup> As interpreted by the CDESCR and other adjudicatory bodies, the substantive content of the right to health includes timely and appropriate health care, access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information.<sup>271</sup>

The CDESCR recognizes a special connection between indigenous peoples’ land tenure and their physical health: “Development-related activities that lead to displacement of indigenous peoples against their will from traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a

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<sup>266</sup> *Ibid.* at para 8.

<sup>267</sup> *Ibid.* at para 13.

<sup>268</sup> ICESCR, *supra* note 57.

<sup>269</sup> Art. 25 UNDRH, ICERD 5(e) (iv), Arts. 11 (1)(f) & 12 CEDAW, Arts. 24 CRC.

<sup>270</sup> General Comment No.14 “The right to the highest attainable standard of health” (Art.12), (11 August 2000) E/C.12/2000/4.

<sup>271</sup> *Ibid.*

deleterious effect on their health.<sup>272</sup> It also imposes a core obligation on states to formulate a national public health strategy that gives particular attention to vulnerable and marginalized groups.<sup>273</sup>

### *The Right to Property and Its Implications for REDD+*

The Inter-American Court has held that a strict juridical or abstract recognition of indigenous lands, territories, or resources lacks true meaning where the property has not been physically established and delimited.<sup>274</sup> In this regard, indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment.<sup>275</sup> This title must be recognized and respected, not only in law, but also in practice, in order to ensure its legal certainty.<sup>276</sup> A rights-based approach to REDD+ that takes indigenous peoples' human right to property into consideration and follows this interpretation would ensure that indigenous peoples' tenure issues are fully addressed in the development of REDD+ schemes. The emerging literature on REDD+ also supports this view: the Stern Review, among others, has emphasized that "at a national level, defining property rights to forestland, and determining the rights and responsibilities of landowners, communities and loggers, is key to effective forest management. It recognizes that process should involve local communities and respect informal rights and social structures."<sup>277</sup> It has also stressed that "clarity over boundaries and ownership, and the allocation of property rights regarded as just by local communities, will enhance the effectiveness of property rights in practice and strengthen the institutions required to support and enforce them."<sup>278</sup> The Eliasch Review has also recognized the danger of customary rights being violated in the interests of inward investment, and through abusive contracts and land speculation

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<sup>272</sup> *Ibid.* at para 27.

<sup>273</sup> *Ibid.* at para 43(f).

<sup>274</sup> *Indigenous Community Yakye Axa*, Paraguay, *supra* note 263 at para. 143.

<sup>275</sup> *Case of The Mayagna (Sumo) Awas Tingni Community*, *supra* note 252, at para. 153; *Ibid.*, *Case of the Indigenous Community Yakye Axa*, para. 215.

<sup>276</sup> *Ibid.*

<sup>277</sup> Nicholas Stern, *supra* note 3 at xxvi.

<sup>278</sup> Nicholas Stern, *Ibid.* at 541; Anne M. Larson, "Forest Tenure Reform in the Age of Climate Change: Lessons for REDD+" (2011) 21 *Global Environmental Change* 540-549; Forest Tenure in the UN REDD Programme Framework Document (Geneva: UN REDD Programme, 2008) at 7; *UN-Programme Operational Guidance: Engagement of Indigenous Peoples and Forest Dependant Peoples* (Geneva: UN REDD Programme, 2009); David Brown, Frances Seymour & Leo Peskett, "How do we achieve REDD co-benefits and avoid doing harm?" In Arild Angelsen ed., *supra* note 111; Thomas Sikor *et al*, "REDD-plus, Forest People's Rights and Nested Climate Governance" (2010) 20 *Global Environmental Change* 423-425.

acting to the detriment of community interests. It stressed that without clear tenure and use rights, sustainable forest management will be impossible and carbon finance may increase social conflict.<sup>279</sup>

*The Right of Indigenous Peoples to Participate in Matters Affecting their Environment*

Indigenous peoples' right to participate in matters affecting their environment is recognized in a number of international instruments. Chief among these instruments is the Rio Declaration on Environment and Development, which notes the vital role of indigenous peoples in environmental protection because of their traditional knowledge. The Rio Declaration requests that states enable their effective participation in the achievement of sustainable development. Principle 22 of the Rio Declaration states:

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.<sup>280</sup>

Although the declaration is legally non-binding, it is designed to commit governments to ensure environmental protection and responsible development. It is intended to be an environmental Bill of Rights, defining the rights of peoples to development, and their responsibilities to safeguard the common environment. The declaration recognizes that the only way to have long-term social and economic progress is to link it with environmental protection and to establish equitable global partnerships between government and key actors.

Chapter 26 of Agenda 21, which is devoted entirely to recognizing and strengthening indigenous peoples and their communities, calls on states in full partnership with indigenous peoples to establish a process to empower indigenous peoples through the recognition of traditional resource management practices, the settlement of land claims, and protection from activities that are environmentally unsound or that indigenous peoples consider to be socially and

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<sup>279</sup> Johan Eliasch, *supra* note 5 at 193.

<sup>280</sup> Rio Declaration on Environment and Development, *supra* note 229.

culturally inappropriate. It also encourages the active participation of indigenous peoples in national legislation and development that may affect them.<sup>281</sup>

Although the full extent of these rights remain unclear, emerging literature on REDD+ suggest that the application of these standards require indigenous peoples' participation and involvement in the design, development, and implementation of all REDD+ activities from the outset.<sup>282</sup> It also requires that governments create new mechanisms to make forest agencies accountable to local populations. For REDD+, the principle of participation implies the need to open decision-making processes at the local and national scales to indigenous people and their representative organizations.<sup>283</sup> Participation in decision making can be enhanced in many ways, such as the decentralization of forest management to elected local governments and villagers.<sup>284</sup> Participation and involvement may also require respect for indigenous peoples' traditional knowledge (TK) in the development process. Traditional Knowledge refers to knowledge, innovations and practices of indigenous peoples and local communities around the world, developed from experience gained over centuries and adapted to local culture and environment. Traditional knowledge is transmitted orally from generation to generation.<sup>285</sup>

A number of studies show that indigenous peoples' traditional knowledge could make a solid contribution to environmental protection. A study by the task force for the International Union for Conservation of Nature (IUCN) has noted that indigenous peoples "are the sole guardian of vast habitats critical to modern societies, and their ecological knowledge is an asset of incalculable value."<sup>286</sup> As a study cited by the IPCC in its Fourth Assessment Report observes, "incorporating indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory and sustainable."<sup>287</sup> Further, the Permanent Forum on Indigenous Issues has stressed that: "As stewards of the world's biodiversity and cultural diversity, indigenous peoples' traditional livelihoods and

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<sup>281</sup> UN Conference on Environmental Development (UNCED) Agenda 21 (UNCED 1993) ch 26.

<sup>282</sup> Sikor et al, *supra* note 278 at 424. Lyster, *supra* note 197 at 125.

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> Miriam Latorre Quinn "Protection for Indigenous knowledge: An International Law Analysis" (2001) 14 ST Thomas Law Review 287 at 292.

<sup>286</sup> ICUN Inter-Commission Task Force on Indigenous Peoples, *Indigenous Peoples and Sustainability: Cases and Actions* (ICUN, 1993) 35.

<sup>287</sup> Cited in *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, *supra* note 172.

ecological knowledge can significantly contribute to designing and implementing appropriate and sustainable mitigation and adaptation measures. Indigenous peoples can also assist in crafting the path towards developing low-carbon release and sustainable communities.”<sup>288</sup> Indigenous peoples’ knowledge should therefore be incorporated in the design of REDD+ projects.

There is an increasing recognition that indigenous women could make significant contributions to the development of REDD+ schemes; this calls for gender dimension to be mainstreamed in REDD+ policies.<sup>289</sup> Indigenous women possess skills and knowledge to mitigate and adapt to climate change, but they remain vulnerable given the discrimination they face as women and as indigenous peoples. Indigenous women play significant roles in sustaining and managing forest because they are the traditional knowledge holders responsible for transmitting that knowledge to future generations. They are also the main subsistence producers and they ensure the food securities of their families and communities. However, indigenous women’s rights and their crucial role in climate change adaptation and mitigation have not been recognized or supported. They have been left behind in the discussions and processes relevant climate change, despite their day-to-day experiences of on-the-ground realities of climate change. REDD+ policies must therefore ensure and support the full and effective participation of indigenous women in all level of decision-making processes.

### *The Right to Free, Prior and Informed Consent*

The right to free, prior and informed consent (FPIC) is an important procedural right and a vital component of indigenous peoples’ rights to self-determination, land, territories, natural resources, and treaties.<sup>290</sup> Although FPIC is by no means a new concept,<sup>291</sup> it is emerging as an important precondition to development activities affecting indigenous peoples’ territories and is

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<sup>288</sup> UN Doc E/C.19/2008/L.2.

<sup>289</sup> Kathleen Ruthford et al, *The Business Case for Mainstreaming Gender in REDD+* (UN- REDD Programme, 2011) at 1-36.

<sup>290</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Final Report of the study on indigenous peoples and the right to participate in decision making* (17 August 2011), 88<sup>th</sup> sess., A/HRC/18/42 at paras. 12, 18 & 20; Bartolome Clavero, “The Indigenous Rights of Participation and International Development Policies” (2005) 22 *Arizona Journal of International and Comparative Law* 41 at 42.

<sup>291</sup> Colchester & Ferrari, *supra* note 179 at 5.

arguably developing into a customary international legal standard.<sup>292</sup> The principle of free, prior and informed consent is principally articulated in the UNDRIP, but it is also elaborated in the General Comments and Recommendations of the UN Human Rights Bodies and the CERD. FPIC is also being elaborated in emerging jurisprudence dealing with indigenous peoples' rights, legislative enactments of states, and the policies of international organizations.

Article 18 and 19 of the UNDRIP Provide:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Although the UNDRIP is a declaration and therefore not legally binding,<sup>293</sup> it does carry a lot of weight given its widespread endorsement. Moreover, scholars have argued that the Declaration does not create new rights; it represents and affirms existing customary international law.<sup>294</sup>

Indigenous peoples' right to FPIC is elaborated in the General Comments and Recommendations of the CERD and the UN Human Rights Bodies. In its interpretation of the ICERD as it applies to indigenous peoples, the CERD has called not just for consultation with indigenous peoples, but also informed consent. In General Recommendation No.23, CERD calls upon State-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and

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<sup>292</sup> Corinne Lewis, "Corporate Responsibility to Respect the Rights of Minorities and Indigenous Peoples" in *State of the World's Minorities and Indigenous Peoples 2012* (United Kingdom: Minority Rights Group International, 2012) at 12; Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples Participation within International Law" (2011) 10:2 *Northwestern Journal of International Human Rights* at 54-84 at 66.

<sup>293</sup> Megan Davis, "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008) 9 *Melbourne Journal of International Law* 439 at 458-59.

<sup>294</sup> Clavero, *supra* note 290 at 43; James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters & Rodolfo Stavehagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Denmark: IWGIA, 2009) at 184. But see Davis, *Ibid* at 465; Alexandra Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments" (2009) 10 *Melbourne Journal of International Law* 27 at 36. Both Davis and Xanthaki argue that it is not completely accurate to suggest that the Declaration represents emerging customary international law.



interests are taken without their informed consent.”<sup>295</sup> With respect to land and resource rights, the CERD calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>296</sup>

The Committee on Economic, Social and Cultural Rights (CESCR), the supervisory body of the ICESCR, has also recognized indigenous peoples’ right to FPIC. In General Comment No. 21, the committee has interpreted Article 15 of ICESCR, which outlines the right to participate in cultural life, as including the rights of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples.<sup>297</sup> The Committee also calls on States parties to the Covenant to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights.”<sup>298</sup> Although general comments or recommendations on the application of a treaty by the U.N. Treaty Supervisory bodies are not legally binding decisions,<sup>299</sup> they are authoritative interpretations of the relevant international instrument that is binding upon State parties to the respective instruments.

The Principle of FPIC has been articulated in the jurisprudence of regional human rights bodies. Nowhere is this more pronounced than in the land mark decision of the Inter-American Court of Human Rights in *Saramaka People v. Suriname*.<sup>300</sup> The *Saramaka* case revolves around the fact that Suriname granted resource concessions to private companies within the territories of the Saramaka People without their consultation or consent. The Court found that Suriname had violated the Saramaka Peoples’ rights, as tribal peoples, to judicial protection and property by granting the logging and mining concessions, and failing to have effective mechanisms to protect them from acts that violate their rights to property as defined in the American Convention. The

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<sup>295</sup> *General Recommendation XXIII (51) supra* note 64.

<sup>296</sup> *Ibid.*

<sup>297</sup> General comment No. 21 “Right of everyone to take part in cultural life” (art. 15 1 (a)) U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

<sup>298</sup> *Ibid.*

<sup>299</sup> Michael O’Flaherty, “The Concluding Observations of United Nations Human Rights Treaty Bodies” (2006) 6 Human Rights Law Review 27 at 33.

<sup>300</sup> *Saramaka People v. Suriname* (2007), Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007).

court explained that in the case of large-scale developments that could impact the survival of a people, the State has the duty not only to consult, but also to obtain free, prior, and informed consent.

The legal standard articulated in the *Saramaka* decisions was closely followed by the African Commission on Human Rights and Peoples' Rights concerning *Endoris in Kenya*.<sup>301</sup> The legal standard articulated in that decision is that in the case of indigenous peoples: any development or investment project that would have a major impact within the community territory, the state has a duty not only to consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions.

FPIC standards are also entering into national laws: for example, in September 2011, Peru adopted landmark legislation, *Law 29785*,<sup>302</sup> that requires the government to consult with indigenous peoples before developing new legislation or creating concession for infrastructure, energy and mining projects that affect their lives, territories and rights of indigenous peoples. The law establishes that the aim of consultation is to reach agreement or consent between the state and the indigenous peoples.<sup>303</sup> Finally, FPIC standards are also being elaborated in the policies of major international organizations: in the context of REDD+, the United Nations REDD Programme (UN-REDD Programme), for example, has created a number of guidelines on FPIC that partner countries are required to follow in territories where REDD+ readiness activities will take place.<sup>304</sup> These articulations and pronouncements on FPIC all seem to indicate that there is either an existing right to FPIC, or one that is emerging in a customary international norm, at least when it comes to development activities that affect indigenous lands and resources.

### *The Normative Content of the Right to FPIC*

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<sup>301</sup> *Endorois Welfare Council v Kenya* (2009), African Commission on Human Rights and Peoples' Rights (4 February 2010).

<sup>302</sup> Law 29785 of the Right to Prior Consultation to Native Towns or Oringiniarios recognized in Convention No. 169 of the International Labour Organization. Available at <http://www.loc.gov/law/>.

<sup>303</sup> *Ibid.* sec 3. Law 29785 also establishes that the contents of the law must be interpreted in line with obligations established in Convention No. 169 of the International Labor Organization (ILO), ratified by Peru in 1994.

<sup>304</sup> UN-REDD Programme Guidelines on Free, Prior and Informed Consent—Draft 2011, Available at <http://www.unredd.net>.

The duty of the state to obtain indigenous peoples' free, prior and informed consent to related legislation or administrative measures reflects more than a mere right to involvement in such processes; it entitles indigenous peoples to effectively determine the outcome of decision making that affects them. Consent obtained through genuine consultation and participation is a significant element of the decision-making process. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but is also a substantive mechanism to ensure the respect of indigenous peoples' rights.<sup>305</sup>

The duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The state's duty to obtain free, prior and informed consent affirms the prerogative of indigenous peoples to withhold their consent and to establish terms and conditions for their consent.

The elements of free, prior and informed consent are interrelated; the elements of "free," "prior" and "informed" qualify and set the conditions for indigenous peoples' consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples.<sup>306</sup> The element of "free" implies no coercion, intimidation, or manipulation; "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been provided with all information relating to the activity and that that information is objective and accurate, and is presented in a manner and form that they understand; "consent" implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.<sup>307</sup>

It should be highlighted that Indigenous peoples have declared that free, prior and informed consent is not negotiable, and that participation and consultation are absolutely

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<sup>305</sup> *Saramaka People v. Suriname* (2007), *supra* note 300 at para 22.

<sup>306</sup> *Ibid.* at para 25.

<sup>307</sup> *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples*, Document E/C.19/2005/3, submitted to the Fourth Session of UNPFII, 16–17 May 2005. At 10-13.

necessary throughout the entire development process.<sup>308</sup> At the same time, however, this does not necessarily mean that FPIC is a veto right; rather, establishing consent is the objective of consultation with indigenous peoples. Neither, should FPIC be viewed as a one-time activity. FPIC is an ongoing process that should ideally start before exploration, and if there is agreement that a project will go ahead, it should terminate when all potential legacy issues have been addressed.<sup>309</sup>

#### *FPIC and Its Implication for REDD+ Activities*

In the context of REDD+, a rights-based approach requires states to obtain indigenous peoples' free, prior and informed consent for all REDD+ activities that will affect their territories. The *Saramaka Case*<sup>310</sup> offers good guidance in this regard. As explained above, in the *Saramaka* decision, the Inter-American Court of Human Rights explained that where significant development projects are likely to have a major impact on indigenous peoples' land, the free, prior and informed consent of the affected indigenous people is required.<sup>311</sup> The Court observed that this is consistent with the jurisprudence of other international human rights bodies as well as with Article 32(2) of the UN Declaration on the Rights of Indigenous Peoples, which require FPIC in connection with projects that may have "a significant impact on the right of use and enjoyment of [indigenous and tribal peoples'] ancestral territories."<sup>312</sup>

The Court explained that effective participation includes a duty to actively consult with affected communities, in good faith and "according to their customs and traditions." The Court recognized that it is the indigenous peoples, not the state, who must decide which person or group of persons will represent them in each consultation process.<sup>313</sup> This duty to consult also includes the following:

- (1) A duty on the state and those authorized by it to both accept and disseminate information, and constant communication between the parties;

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<sup>308</sup> Joint Statement of the Global Caucus of Indigenous Peoples, 10 Session of the United Nations Permanent Forum on Indigenous Issues, New York, May 16 to 27 2011 at 1-2.

<sup>309</sup> Viviane Weitzner, "Bucking the Wild West: Making Free, Prior and Informed Consent Work" (Speaking Notes for Free, Prior and Informed Consent panel, Prospectors and Developers Association of Canada annual Convention March 3, 2009). Available at [http://www.nsi-ins.ca/english/research/progress/20\\_2.asp](http://www.nsi-ins.ca/english/research/progress/20_2.asp).

<sup>310</sup> *Saramaka People v. Suriname* (2007), *supra* note 300.

<sup>311</sup> *Ibid.* para. 133-134.

<sup>312</sup> *Ibid.* paras. 131-140.

<sup>313</sup> *Ibid.* at para. 18.

- (2) Consultations must be undertaken in good faith, through culturally appropriate procedures and with the objective of reaching an agreement;
- (3) Indigenous and tribal peoples must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State;
- (4) The state must ensure that the indigenous and tribal peoples are aware of possible risks, including environmental and health risks, so that the proposed project is accepted knowingly and voluntarily; and finally,
- (5) Consultation should take account of indigenous and tribal peoples' traditional methods of decision-making.<sup>314</sup>

REDD+ could have serious implications for indigenous forest-dependent peoples if their rights are not fully safeguarded in the design and implementation of REDD+ policies. Developing REDD+ in accordance with a rights-based approach is one of the best ways to safeguard indigenous peoples' rights. Adopting a human rights-based approach in the development of REDD+ could also produce other benefits. A rights-based approach will not only safeguard indigenous peoples' rights and reduce potential harm, it will also empower indigenous peoples to be active participants, not just passive victims, in REDD+ policies. This could contribute to overall environmental sustainability. A rights-based approach could also enhance REDD+ policies. Where rights are respected and secured, REDD+ policies are more likely to be transparent and inclusive. Finally, a rights-based approach could contribute to the overall success of REDD+. For example, when indigenous peoples' rights are not respected, conflicts and hostility may increase, which would be costly for poor economies and would hinder progress with REDD+. Investors are unlikely to invest in countries with hostile environments, as this creates both reputational risk and uncertainty in the delivery of REDD+ commitments. Thus, resolving all issues concerning indigenous rights is important for the success of REDD+.

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<sup>314</sup> at para. 133.

In Guyana's case, the prevailing legal and political framework governing Amerindians is inadequate to safeguard Amerindians' rights in REDD+. It is therefore imperative that Guyana adopt a human rights-based approach in the development of its REDD+ model. The various international instruments, such as UNDRIP, the CERD, and the CDB, offer a solid normative framework for the development of REDD+ policies. Guyana must use these instruments to guide the development and implementation of its current REDD+ initiative, because it is a party to these instruments and also because it is a good, pragmatic approach.

## Chapter 4

### **Guyana's Failure to Safeguard Amerindian Rights in REDD+ Development**

This chapter examines the ways in which Guyana's REDD+ model fails to safeguard indigenous peoples' rights. Particular attention is paid to Guyana's failure to address critical land-rights issues, as well as its failure both to ensure Amerindians' full and effective participation in the design of REDD+ and to respect their right to free, prior and informed consent. Within the framework of the law, this chapter argues that Guyana's actions are contrary to its international obligations regarding the rights of indigenous peoples. To this end, this chapter will examine Guyana's obligations under human rights laws to show that its treatment of indigenous peoples' rights in the development of REDD+ falls short of international standards and emerging jurisprudence.

### **Guyana's REDD+ Model and its Implications for Amerindians**

Guyana's REDD+ initiative has significant implications for Amerindians. Unlike the 90 percent of Guyanese who live on the coastal regions and have lifestyles that are not dependent on the forest, Amerindians occupy vast portions of the forest in the interior and are heavily dependent upon these areas for both their physical and cultural survival. From the perspective of rights, Guyana's REDD+ model is being pioneered at a time when Amerindians are still struggling to overcome centuries of European colonialism that reduced them to an inferior class of citizenship; denied them legal ownership of their lands, territories, and resources; and undermined their sovereignty as peoples.<sup>315</sup> This has been followed by decades of post-colonial social neglect, human rights abuses, and a range of other exploitations that have synergistically operated to make Amerindians some of the most marginalized and vulnerable people in Guyana.<sup>316</sup>

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<sup>315</sup> Fergus Mackay & Jean La Rose, "Our Land, Our Life, Our Culture: The Indigenous Movement in Guyana" (1999) Vol. 24: 3 Cultural Survival Quarterly 29-34; Mary Riley, ed., "Amerindian Rights Movement in Guyana and its Influence" in Mary Riley ed., *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Altamira Press: California, 2004) at 99-121.

<sup>316</sup> *Request for Adoption of a Decision under the Urgent Action/Early Warning Procedure in Connection with the Imminent Adoption of Racially Discriminatory Legislation by the Republic of Guyana and Comments on Guyana's State Party Report*, (CERD/C/446/Add.1) (Submitted by Amerindian Peoples Association & Forest Peoples

Despite legal and political reforms that have been realized in recent years, particularly in the area of constitutional reforms (mostly brought about by the advocacy of a vibrant Amerindian rights moment and not necessarily an initiative of the state),<sup>317</sup> Amerindians still lack many of the inalienable rights that are necessary for their protection and survival as indigenous people. These include, *inter alia*, full rights to own and control their ancestral lands, territories, and resources; rights to participation; and rights to FPIC. All of these rights are either very weak or non-existent in Guyana.<sup>318</sup>

The treatment of Amerindians in the development of the country's REDD+ model, to date, leaves much to be desired in terms of recognition and protection of important human rights of indigenous peoples. The government is once again taking a "business-as-usual" approach in the design and implementation of this model. The current focus is mainly on developing sophisticated and complex carbon-accounting and -monitoring systems, constructing a high-powered hydroelectric dam, and promoting overall economic development, while less attention is being directed at adequately safeguarding indigenous peoples' rights.<sup>319</sup>

### **Guyana's International Obligations Regarding Indigenous Peoples**

#### *Guyana's Obligations under International Human Rights Instruments*

Guyana has ratified and endorsed several international instruments that are relevant to indigenous peoples. Guyana has endorsed UNDRIP. It is party to the International Covenant on Civil and Political Rights (1966) (ICCPR), the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD), the Convention on the Rights of the Child (1989), the American Declaration on the Rights and Duties of Man (1948), and the Convention of Biological

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Programme to the 68<sup>th</sup> Session of the Committee on the Elimination of Racial Discrimination, Geneva, 20 February-10 March 2006).

<sup>317</sup> Jean La Rose, *Report of the Amerindian Representative on the Constitution Reform* (Georgetown: Amerindian Peoples' Association, 1999).

<sup>318</sup> Colchester, La Rose & James, *supra* note 30 at 15-36; "Guyana's Indigenous peoples: Still languishing on the periphery" *Stabroek News* (28 May, 2008), online: *Stabroek News* <http://www.stabroeknews.com/2008/guyana-review/05/28/guyana%E2%80%99s-indigenous-peoples/>; Tony James, "Indigenous Peoples' Land Rights", *supra* note 35 at 3-10.

<sup>319</sup> Kate Dooley *et al*, *Cutting corners: World Bank's forest and carbon fund fails forests and peoples* (Brussels: FERN, 2008) at 18.



Diversity (1992) (CBD). Article 154A of Guyana's reformed Constitution incorporates international human rights instruments that are listed in the fourth schedule, and it establishes a series of obligations in relation thereto under domestic constitutional law. These obligations are in principle enforceable in local courts and, as constitutional norms, supersede incompatible statutory or administrative acts.<sup>320</sup> Instruments listed in the fourth schedule that are relevant to indigenous peoples include: the CERD, The ICCPR, the ICESCR the Convention on the Rights of the Child (1989) and American Declaration on the Rights and Duties of Man.

These instruments affirm that Amerindians have rights to their ancestral lands, territories, and resources, self-determination, culture, participation and Free, Prior and Informed Consent (FPIC), among other rights. They also impose obligations on Guyana to recognize, respect, and guarantee Amerindians these rights. In its 1997 General Recommendation, the CERD has called upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>321</sup> CERD's 1997 General Recommendation also called upon state-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>322</sup> The UN Declaration on the Rights of indigenous Peoples recognizes that indigenous peoples have rights to self-determination, and property and Free, Prior and informed Consent, among other rights. While the UNDRIP is a declaration and is therefore not legally binding as Conventions are, scholars argue that it does not set new international standards on human rights; rather, it merely interprets international human rights law as it applies to the specific situations of indigenous peoples as distinct peoples.<sup>323</sup>

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<sup>320</sup>154 A (1) states that "... every person, as contemplated by the respective international treaties set out in the Fourth Schedule to which Guyana has acceded is entitled to the human rights enshrined in said international treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary and all organs and agencies of Government and, where applicable to them, by all natural and legal persons and shall be enforceable in the manner hereinafter prescribed."; Bulkan, "Democracy in Disguise", *supra* note 63; R.W. James, *The Constitution of Guyana; A Study of Its Dysfunctional Application* (Georgetown: Panvik Press, 2006) at 52-53.

<sup>321</sup> *General Recommendation XXIII (51, supra* note 64.

<sup>322</sup> *Ibid.*

<sup>323</sup> Clavero, *supra* note 290 at 43.

Article 27 of the ICCPR protects minority rights. It states that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This article protects linguistic, cultural and religious rights and, in the case of indigenous peoples, includes, among others, land and resource, subsistence and participation rights.<sup>324</sup> Similar language is found in article 30 of the UN Convention on the Rights of the Child. Article 30 reads: “In those states in which ethnic, linguistic or religious minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right in community with other members of the group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”

By virtue of ratifying and endorsing these international instruments relevant to indigenous peoples, Guyana has pledged its commitment to recognizing and protecting Amerindians human rights. Article 31(1) of the Vienna Convention on the Law of Treaties reads: “a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose.”<sup>325</sup> This is a fundamental principle of international law and applicable to all states irrespective of ratification of the Vienna Convention. The object and purpose of human rights instruments is the effective protection of human rights and the interpretation of all their provisions must be subordinated to that object and purpose.

#### *Guyana’s Obligations under Customary International Law*

In addition to obligations under international treaty law, Guyana may also have obligations to respect Amerindian rights under customary international law. Under article 38 (1) (b) of the Statute of the International Court of Justice (ICJ), “customary” international law can be understood as non-treaty law generated through consistent practice accompanied by a sense of legal obligation (*opinio Juris*). In the context of indigenous peoples’ human rights, scholars have made the argument that those rights that apply to indigenous peoples’, or at least some of them,

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<sup>324</sup> HRC, General Comment No.23, *supra* note 68.

<sup>325</sup> May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

have achieved the status of customary international law and are legally binding except towards persistent objectors.<sup>326</sup>

There is a strong presumption in favour of rights such as property and self-determination (internal version) as having achieved the status of customary international law given their wide spread acceptance by the international community and states. Anaya and Wiessner have argued that a number indigenous rights have crystallized into customary international law, including indigenous peoples' rights to own, develop, control and use the lands that they have traditionally owned or otherwise occupied and used.<sup>327</sup> Wiessner's 1999 comparative research on state practise on indigenous matters revealed many positive changes in national legislations and practices,<sup>328</sup> which proved that at least indigenous land rights and rights to natural resources acquired the status of customary international law.<sup>329</sup> The Inter-American Commission of Human Rights also supports this view: In the *Awas Tingni case*, the Commission asserted that "there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands."<sup>330</sup>

With respect to indigenous sovereignty, Fredderico Lenzerini has argued that state practice recognizing indigenous sovereignty "has today reach a worldwide dimension rather constantly reiterated."<sup>331</sup> The right to FPIC is also steadily emerging as a customary international legal norm and may be binding on states.<sup>332</sup> Although the right is only recognised in the UNDRIP which is non-binding, it has been articulated the General Comments and Recommendations of the UN supervisory treaty bodies, the CERD, the jurisprudence of region human rights bodies, state legislation and the policies of international organizations. It should be emphasized that in the development of Guyana's REDD+ initiative, the government has stated its commitment to

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<sup>326</sup>James Anaya (1996), *supra* note 236 at 49-58.

<sup>327</sup> James Anaya & Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment" (*Jurist Legal News and Research - Forum* US 3 October 2007), cited in Alexandra Xanthaki, *supra* note 294 at 35.

<sup>328</sup> Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective" (1999) 12 *Harvard Human Rights Journal* 57.

<sup>329</sup> Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in light of the UN Declaration on the Rights of Indigenous Peoples" (2008) 41 *Vanderbilt Journal of Transnational Law* 1141.

<sup>330</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, *supra* note 252 at 71.

<sup>331</sup> Federico Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" (2007) 42 *Texas International Law Journal* 155 at 180.

<sup>332</sup> Lewis, *supra* note 292.

respecting Amerindian right to FPIC in all its REDD+ activities.<sup>333</sup> This indicates an acknowledgement that there is an existing right to FPIC, and that it should be respected.

### ***Guyana's Failure to Safeguard Amerindian Property Rights in REDD+ Activities***

Land continues to be the single most contentious issue between the Government of Guyana and the Amerindian people.<sup>334</sup> Amerindians have been demanding, with little success, legal recognition of their rights to their ancestral lands, territories, and resources throughout Guyana's post-independence period.<sup>335</sup> As the discussion and plans for Guyana's REDD+ model got underway, Amerindian leaders and representatives emphasized that addressing all outstanding land claims must be a precondition to the development this model:<sup>336</sup>

Our top most priority is to again call for immediate measures to secure our traditional lands and territories. We underline that fair and transparent policies and actions to resolve our outstanding land claims must be put in place as a priority before the implementation of extractive industry projects, LCDS/REDD+ or any other project that may have direct or indirect impacts on our traditional lands, territories and resources.<sup>337</sup>

Indeed, these demands are reasonable, given the historical and present insecurities Amerindians continue to experience regarding their traditional lands, territories, and resources. Addressing all outstanding land claims is also necessary to prevent any potential harm to Amerindians that may result from the development of the government's REDD+ initiatives.

Rather than revising current legal and policy measures for addressing Amerindians' land tenure issues in line with CERD or the UN Declaration on the Rights of Indigenous Peoples, the Guyanese government has shown a general inertia or unwillingness to undertake any type of serious reforms. The government's plan is to invest finances into accelerating demarcation, titling, and extension of Amerindian titled lands.<sup>338</sup> This will be done in accordance with normal

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<sup>333</sup> *A Low Carbon Development Strategy*, *supra* note 1 at 34.

<sup>334</sup> Colchester & La Rose, *supra* note 50 at 9.

<sup>335</sup> See the Petition for recognition of Amerindian land rights by Stephen Campbell, *supra* note 82.

<sup>336</sup> Public Statement by participants in a training of trainer workshop on *Indigenous Peoples Rights, Extractive Industries and National Development Policies in Guyana* held at Cara Lodge, Georgetown, Guyana (March 2-8 2010), online: Forest Peoples Programme < <http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2010/public-statement-participants-workshop-indigen>>.

<sup>337</sup> *Ibid.*

<sup>338</sup> "LCDS 2010: "Amerindian communities to get US\$8M of Norway \$30M" *Stabroek News* (October 25, 2010), online: Stabroek News < <http://www.stabroeknews.com/2010/news/breaking/10/25/amerindian-communities-to-get-us8m-of-norway-30m/>>; Joanne Earle, "Jagdeo outlines Amerindian development plans for GRIF money" *Guyana chronicle* (26 October 2010), online: Guyana Chronicle

government policy and procedure as set out under sections 59–64 of the *Amerindian Act*.<sup>339</sup> This project is set to be run by the Ministry of Amerindian Affairs and the Guyana Lands and Surveys Commission under the supervision of the United Nations Development Programme (UNDP). The major problem with this plan is that it ignores the deficiencies contained in the *Amerindian Act* regarding Amerindian titles as well as the underlying weaknesses that are inherent in the current titling and demarcating process. Consequently, accelerating demarcation and titling will do nothing to address the legal insecurities that Amerindians have faced for centuries. This will only allow the government to maintain control of vast portions of Amerindian ancestral territories while undermining indigenous peoples' ability to freely pursue their economic, social, and cultural development as well as their ability to freely dispose of their natural wealth and resources.

Guyana's approach of accelerating demarcation, titling, and extension of Amerindian titled lands is contrary to international law because it narrowly interprets Amerindians' interest in lands and resources as only those interests falling within the state's formal legal system of land titling, leasing, and permitted. As the CERD has affirmed<sup>340</sup> and as was made clear in the UN Declaration on the Rights of Indigenous Peoples, indigenous peoples' rights to land derive from their customary ownership, occupation, and other use of the land.<sup>341</sup> These rights do not depend on any act of state, the existence of which indigenous peoples, in any case, predate. These rights endure until they are extinguished by a legitimate legal process or until they are voluntarily relinquished by the customary right-holders.

Within the Inter-American system, the Court, and Commission have also developed a body of jurisprudence that recognizes that a state's obligations to clarify and secure the traditional lands of indigenous peoples "are not limited to those property interests that are already recognized by States or that are defined by domestic law, but rather, the right to property

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[http://www.guyanachronicleonline.com/site/index.php?option=com\\_content&view=article&id=20385%3Ajagdeo-outlines-amerindian-development-plans-for-grif-money&Itemid=12](http://www.guyanachronicleonline.com/site/index.php?option=com_content&view=article&id=20385%3Ajagdeo-outlines-amerindian-development-plans-for-grif-money&Itemid=12).

<sup>339</sup> *Amerindian Act*, *supra* note 48 secs.59 -64 "Grants of Communal Land to Amerindian Villages and Amerindian Communities."

<sup>340</sup> *CERD General Recommendation XXIII (51)*, *supra* note 64.

<sup>341</sup> *UNDRIP*, *supra* note 67 Article 26.

has an autonomous meaning in international human rights law.”<sup>342</sup> Guyana has not ratified the American Convention on Human Rights (ACHR), but it has affirmed the American Declaration of the Rights and Duties of Man. Although the American Declaration is not a legally binding document, it is interpreted as a source of international legal obligations for member states of the Organisation of American States (OAS) by both the Commission and the Court.<sup>343</sup> The decisions and opinions of the Commission and the Court are therefore very persuasive and relevant to Guyana.

In the *Maya Indigenous Communities* case<sup>344</sup> the petitioners complained that the State of Belize had, under the American Declaration of the Rights and Duties of Man, violated the rights of the Maya people living in the Toledo District of Southern Belize over certain lands and natural resources. They contended that Belize officials had uniformly failed to recognize the rights or interests they held in lands on the basis of Maya customary land use and occupancy. Officials had narrowly interpreted interests in lands and resources as those recognized within the state’s formal system of land titling, leasing, and permitting. In particular, the petitioners argued that the reservation system established by the British colonial government in Belize in the early 1900s fell short, in both its geographic extent and its qualitative attributes, of providing recognition or adequate protection of their customary land tenure. Only approximately one half of the Maya villages fell within the reservations, and further, the boundaries of those reservations remained unclear. The petitioners also contended that the reservation areas encompassed only a fraction of the land areas used by the reservation villages for cultivation and for other subsistence and cultural activities. They furthered argued that qualitatively, the reservation regime provided inadequate security for Maya land tenure, as lands within the reservations are deemed, under relevant Belize legislation, to be “national lands” and are given up to the discretionary authority of government with no specific guarantees for Maya interests. In that case, the IACHR found that the rights to property protected by the OAS Charter through Article XXIII of the American Declaration of the Rights and Duties of Man were not limited to those property interests that are

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<sup>342</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), *supra* note 252.

<sup>343</sup> Inter-American Commission on Human Rights, *Basic Document Pertaining to Human Rights in the Inter-American System: Introduction*, Available at <http://www.oas.org>.

<sup>344</sup> Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).

already recognized by states or those that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. The Commission ordered Belize to adopt this principle in its domestic law, and to implement it with due consultation measures necessary to demarcate and protect the territory in which the Maya people had communal property rights.

In the landmark case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court of Human Rights on August 31, 2001, the Court held that the international human right to enjoy the benefits of property, particularly as affirmed in the American Convention on Human Rights, includes the right of indigenous peoples to the protection of their customary land and resource tenure. The Court held that the State of Nicaragua violated the property rights of the Awas Tingni community by granting to a foreign company a concession to log within the community's traditional lands and by failing to otherwise provide adequate recognition and protection of the community's customary tenure. It was not enough that the Nicaraguan constitution and laws recognized in general terms the rights of indigenous peoples to the lands they traditionally use and occupy. The Court admonished Nicaragua for not securing the effective enjoyment of those rights for Awas Tingni or for the vast majority of indigenous communities of the Atlantic Coast region of Nicaragua. Like Awas Tingni, most of the indigenous communities of the Atlantic Coast were without specific government recognition of their traditional lands in the form of a land title or other official documentation. In the absence of such specific government recognition, Nicaraguan authorities had treated the untitled traditional indigenous lands or substantial parts of them as state lands, as they had done in granting concessions for logging in the Awas Tingni area. The Court ordered Nicaragua to demarcate and title Awas Tingni's traditional lands in accordance with its customary land and resource tenure patterns, to refrain from any action that might undermine the community's interests in those lands, and to establish an adequate mechanism to secure the land rights of all indigenous communities of the country.

Similarly, in the 2007 decision of the *Saramaka Peoples v. Suriname*<sup>345</sup> the Inter-American Court of human Rights found that tribal Maroons had property rights that included natural resources that are grounded in and arise from their customary law and tenure. It did not

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<sup>345</sup> *Saramaka People v. Suriname*, *supra* note 300.

matter that Suriname's domestic law recognized no such rights. Drawing on its earlier jurisprudence, the Court stated that, based on Article 1(1) of the American Convention on Human Rights, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of "property rights" in order to safeguard their physical and cultural survival. The court also held that the state's legal framework merely granted the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court held that, rather than having a privilege to use the land, which can be taken away by the state or trumped by real property rights of third parties, indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected not only in practice but also in law so as to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples.

In all of these cases, the Court and Commission have maintained that indigenous and tribal peoples' property rights do not depend on domestic law for their existence, but are grounded in and arise from their customary laws and tenure. Members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of property rights in order to safeguard their physical and cultural survival. States have corresponding obligations to recognize, secure, and protect indigenous and tribal peoples' property rights, *inter alia*, through demarcation, delimitation, and titling, all of which must be conducted in accordance with the norms, values, and customs of the indigenous peoples concerned; where necessary, states must adopt or amend their domestic laws to this end.

Guyana's current approach to addressing Amerindians' land tenure issues falls short of the standards set out in these cases and is contrary to both CERD and the UN Declaration on the Rights of Indigenous Peoples. In its 1997 General Recommendation, the Committee especially called upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used



without their free and informed consent, to take steps to return those lands and territories.<sup>346</sup> In its 1996 concluding observation on Guyana the CERD committee also urged Guyana's government to establish adequate procedures, and to define clear justice criteria to resolve land claims by indigenous communities within the domestic justice system while taking due account of relevant indigenous customary laws.<sup>347</sup> Article 26 of the UNDRIP calls upon states to establish and implement, in conjunction with indigenous peoples fair, independent, impartial, open and transparent processes in accordance with indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. The government must use these norms to develop a fair, effective, and transparent mechanism to clarify Amerindian territorial rights and land claims in accordance with indigenous customary laws and tenure, and in a way that ensures their full and effective participation.

#### *Guyana's Potential Violation of Amerindians Right to Food, Life, Health and Cultural Integrity*

The government's failure to establish fair and effective laws and policies to address Amerindians outstanding land claims could have particular consequences for other important human rights.

#### *Undermining Amerindian Right to Food and Life*

The ICESCR, to which Guyana is a party, recognizes that the right to food is fundamental to the inherent dignity of the human person and indispensable for the fulfilment of other human rights enshrined in the International Bill of Rights.<sup>348</sup> It interprets the right to adequate food as encompassing both the availability of and accessibility to food.<sup>349</sup> Guyana's failure to address Amerindian land claims in the development of the country's REDD+ Model could have significant implications on the ability of Amerindians to access food. Since much of Amerindian traditional subsistence activities are carried out on so-called "state land," if the government were

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<sup>346</sup> CERD General Recommendation XXIII (51), *supra* note 64.

<sup>347</sup> CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana, *supra* note 79.

<sup>348</sup> CESCR, General Comment No.12, *supra* note 265.

<sup>349</sup> *Ibid.* at para 8.

to zone these areas, establishing national parks and protected areas within which subsistence activities were prohibited, Amerindians ability to access to food sources could be curtailed. The scenario of indigenous peoples being denied access to subsistence activities is not difficult to envisage: in fact, in February 2009, the former Guyanese president publicly stated that one major goal of a national REDD+ strategy would be to make Amerindian people “less dependent on traditional crops and forest lands and resources.”<sup>350</sup> Only after outcry from Amerindian communities, did the government retracted its statement, commenting that LCDS would not target Amerindian traditional practices. While the retraction of the statement was a good move by the government, without sufficient ownership rights, there is really no guarantee that the government will not renege upon its decision, particularly when such significant financial resources are at stake.

Supporters of the government’s REDD+ initiatives argue that it is unlikely that Amerindians occupying and using state lands would be disturbed, since traditional rights are preserved under the 2006 *Amerindian Act*.<sup>351</sup> This protection, however, was significantly weakened with the passage of the 2009 *Forestry Act*. Under this legislation, traditional Amerindian rights to the state forest have been reduced to “sustainable non-commercial practices.”<sup>352</sup> Since the legislation does not define what “sustainable non-commercial practices” are, this ambiguity could have implications for communities that collect fruits, beads, seeds, and other non-timber products for food, art, or crafts that they presently trade.<sup>353</sup> Many Amerindian communities depend upon such activities to support their livelihoods and any finding of their trade activities are “commercial” would undermine their ability to survive. Judging from this legislation, there is a strong likelihood that Amerindians could see their ability to use traditional untitled lands being further curtailed when the government enacts specific legislation to govern REDD+ activities.

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<sup>350</sup> “Indigenous communities need to diversify their economies – Jagdeo” *Kaieteur News* ( February 10, 2009)

<sup>351</sup> Melinda Janki, “Case Study: Guyana” in John Costenbader, “Legal Frameworks for REDD: Design and Implementation at the National Level” (2009) 77 IUCN Environmental Policy and Law Paper at 158.

<sup>352</sup> *Forest Act*, *supra* note 53 sec. 2 (e).

<sup>353</sup> “Guyana’s Indigenous Peoples’ Rights, REDD and the Draft Low Carbon Development Strategy” (A Summary Report on Workshop held at the Regency Suites, Georgetown 24-26 June 2010) (Georgetown: Amerindian Peoples’ Association, 2010) at 9.

The government's failure to secure Amerindian land rights could also undermine Amerindians right to life. The UN Human Rights Committee has confirmed that the right to life should not be interpreted narrowly;<sup>354</sup> the right to life means more than just physical survival. With respect to indigenous peoples, their right to life depends on their continuing relationship with the land. The link between land and life was also recognized in *Cal v. The Attorney General of Belize and the Minister of Natural Resources and the Environment*, in which Chief Justice Conteh held that, without legal protection of the Maya rights to and interests in their customary land, the Maya enjoyment of their right to life would be seriously compromised.<sup>355</sup> The Inter-American Court of Human Rights has also recognized that the failure to respect land rights has a negative effect on indigenous peoples' right to life because it deprives the community of "access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and practice traditional medicine to prevent and cure illnesses."<sup>356</sup>

#### *Undermining Amerindian Right to Health*

Article 12 of the ICESCR, to which Guyana is a signatory, recognizes the right to the "highest attainable standard of physical and mental health."<sup>357</sup> With respect to indigenous peoples, the CESCRC recognizes a special connection between indigenous peoples' land tenure and their physical health: "development-related activities that lead to displacement of indigenous peoples against their will from traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."<sup>358</sup> It also imposes a core obligation on states to formulate a national public health strategy that gives particular attention to vulnerable and marginalized groups.<sup>359</sup> Guyana's failure to address all Amerindians land claims will have implications for their health, because Amerindians will be further exposed to the negative consequences of mining that is promoted within their territories. Although it is a significant development strategy, the

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<sup>354</sup> General Comment No. 6 *supra* note 260.

<sup>355</sup> Supreme Court of Belize, *supra* note 262.

<sup>356</sup> *Yakye Axa Indigenous Community v. Paraguay*, *supra* note 263.

<sup>357</sup> ICESCR, *supra* note 57.

<sup>358</sup> CESCRC, General Comment No.14, *supra* note 270 at para 27.

<sup>359</sup> *Ibid.* at para 43(f).

government's REDD+ initiative does not aim to halt mining; mining, as explained in the LCDS, will continue in a sustainable manner in accordance with existing laws and guidelines that govern its practice.<sup>360</sup> How sustainably mining will be carried in an environment underscored by lax laws, and weak institutional and regulatory controls, is yet to be seen. Numerous studies, including a 2007 on-site study done by Harvard Human Rights Programme,<sup>361</sup> and a 2010 study by the forest Peoples Programme and the North South Institute,<sup>362</sup> document the major health consequences that Amerindians have endured as a result of mining. Mercury burned in open air and later accumulated in fish has caused mercury poisoning and has contributed to other serious health problems including increased birth defects, and even deaths; pits left open are breeding grounds for mosquitoes, resulting in increased malaria infections. Mining also has negative social impacts on Amerindians peoples and communities: mining has infiltrated Amerindians communities and cultures bringing in its wake, increase alcoholism, violence, prostitution and the increased incidence of STDs and HIV/AIDS, which is currently the leading cause of death of Amerindians. Sexual abuse and rape of Amerindians women and girls, many of which have gone unreported and unresolved, and human trafficking of indigenous girls are also a direct result of mining. Mining is also responsible for the displacement of whole populations as a result of severe environmental degradation, pollution of important waterways, and disruption of vital eco-systems. Without effective measures to secure Amerindians land tenure claims, it is like that Amerindians will continue to suffer severe health consequences that results from mining.

### *Destruction of Amerindian Culture, Identity, and Way of Life*

Guyana's failure to safeguard Amerindian land tenure claims may have significant implications for Amerindians right to culture as recognized under article 27 of the ICCPR. Article 27 of the ICCPR, to which Guyana is a party, protects minorities' right to culture. The Human Rights Committee has confirmed that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of

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<sup>360</sup> Low Carbon Development Strategy, *supra* note 1 at 32.

<sup>361</sup> *All that Glitters-Gold Mining in Guyana*, *supra* note 94.

<sup>362</sup> Marcus Colchester & Jean La Rose, *supra* note 50 at 17-19.

indigenous peoples.<sup>363</sup> That right may include such traditional activities such as fishing or hunting, and the right to live in reserves protected by law.<sup>364</sup> The enjoyment of those rights require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.<sup>365</sup>

Guyana's REDD+ model is not only limited to forestry preservation, but also seeks to promote an overall low-carbon development economy through the promotion of large-scale agriculture activities and hydroelectric dams. Currently high on Guyana's REDD+ agenda is the construction of a 154-megawatt hydropower dam, popularly known as Amalia Hydropower Project. This dam will be built deep in the rainforest on the traditional lands of the Patamona, Akawaio, and Arekuna people.<sup>366</sup> It is also expected that at least one major access road would run through the territory of an Amerindian community.<sup>367</sup> The 2011 Environmental and Social Impact Assessment (ESIA) done by Amalia Falls Hydro Inc. identifies a number of potential negative impacts that the Amalia Hydropower Project would have on Amerindian traditional activities,<sup>368</sup> although its remains overly optimistic that, in actuality, these effects might be minimal.<sup>369</sup> However, local experts disagree: commenting on the company's findings, Janette Bulkan and John Palmer have noted that this forecast is very unlikely, given that the company only spent one month engaging with Amerindian communities in the process of compiling the report.<sup>370</sup> This is compared to a 2002 Environmental Impact Assessment (EIA) for the same project, which was developed after extensive contact with Amerindian communities and found that the dam will impact Amerindians in every way possible.<sup>371</sup> According the 2002 EIA, not only will Amerindians' food security, lands, territories, resources, and traditional activities

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<sup>363</sup> HRC, General Comment No. 23, *supra* note 64 at 3.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid.*

<sup>366</sup> *Final Environmental Impact Assessment Report; Amalia Hydro-Electric Project Prepared for Synergy Holdings Inc. & Harza International Company LCC* (Georgetown: Grounds Structures Engineering Consultancy, 2002) 47-49; Goodland, *supra* note 136 at 3-6.

<sup>367</sup> *Ibid.*

<sup>368</sup> *Environmental Social Impact Assessment Update Report (ESIA)*(Guyana: Amalia Hydro falls Inc., 2011) at 133-138 available at <http://amaliahydropower.com/wp-content/uploads/2011/03/05-Environmental-and-Social-Impacts.pdf>.

<sup>369</sup> *Ibid.*

<sup>370</sup> Janette Bulkan & John Palmer, "Guyana- Amelia Falls Hydropower Dam and Access Road" (Notes for Advisory Expert Panel of Inter-American Development Bank, February, 2011).

<sup>371</sup> *Final Environmental Impact Assessment Report; Amalia Hydro-Electric Project*, *supra* note 366.

suffer, their very identity, society, and cultural integrity would be at risk.<sup>372</sup> The huge influx of migrant workers for construction of the dam and potential settlement afterwards would put a strain on the Amerindian food supply; it could also lead to serious intercultural and land conflicts. The opening up of this remote part of Guyana could also set the pace for other forms of development in this region, resulting in a complete transformation of these areas. This could force Amerindians to the fringes of society and force them to abandon their traditional lifestyles and develop lifestyles that would be difficult if not impossible to maintain.<sup>373</sup> Addressing all outstanding Amerindian land claims is therefore necessary to ensure that Amerindian culture is not undermined.

#### *Guyana's Failure to Ensure Amerindian Participation in REDD+*

Guyana is a party to the Convention of Biodiversity, and a supporter to the Rio Declaration on Environmental Development and the United Nations Declaration on the Rights of Indigenous Peoples. All of these agreements recognize the rights of indigenous peoples to participate in matters affecting their territories. As a party to the instruments, Guyana should ensure that measures are put in place to enable Amerindians' effective participation in the design and implementation of the country's REDD+ model. Principle 22 of the Rio Declaration states that Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development<sup>374</sup> The Convention on Biological Diversity (CBD),<sup>375</sup> which entered into force in 1993, contains provisions on traditional knowledge. The convention states:

Each contracting party shall, as far as possible, subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous peoples and local communities embodying traditional lifestyles for the conservation and sustainable use of biological diversity and promote their

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<sup>372</sup> *Ibid.* at 80.

<sup>373</sup> *Ibid.*

<sup>374</sup> Rio Declaration on Environment and Development, *supra* note 229.

<sup>375</sup> June 5, 1992, 1760 U.N.T.S. 79, 143; 31 I.L.M. 818 (1992).

wider application and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.<sup>376</sup>

Participation as contemplated in these instruments calls for the inclusion of indigenous peoples in all levels the decision making process. In the context of REDD+, indigenous peoples should be involved in the design, development, and implementation of REDD+ from the outset.<sup>377</sup> For REDD+, the principle of participation implies the need for open decision-making processes at the local and national levels to involve indigenous people and their representative organizations.<sup>378</sup> Participation in decision making can be put into action in many ways, such as through the decentralization of forest management to elected local governments and villagers.<sup>379</sup> Participation also implies respect for indigenous peoples' traditional knowledge and inclusion of gender dimensions in the development process. In the context of REDD+, participation requires creating space to facilitate the contribution of indigenous traditional knowledge and the participation of women. The development of Guyana's REDD+ model, however, has been far from participatory.

The government's 2009–2010 progress report claims that “mechanisms have been put in place to enable the effective participation of all indigenous peoples and other local forest communities.”<sup>380</sup> However, it is unclear just what these mechanisms are.<sup>381</sup> Amerindians on the whole have played no significant role in development of Guyana's REDD+ initiative thus far. When the initial design of Guyana's Low Carbon Development Strategy was launched in June 2009, Amerindians (and in fact the whole of Guyana) hardly understood what REDD+ and LCDS meant and what the implications would be for their communities.<sup>382</sup> Indigenous peoples and the public in Guyana first heard about the president's forest and carbon trading plans by

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<sup>376</sup> *Ibid.* Article 8(j).

<sup>377</sup> Sikor et al, *supra* note 278 at 424; Lyster, *supra* note 197 at 125.

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

<sup>380</sup> *Guyana-Norway MOU: Annual Progress Report 2010* (Republic of Guyana: Office of the President 2010) at 6-7.

<sup>381</sup> John Palmer, “Annual Progress Report on REDD-Plus Enablers-2010-for the Norway-Guyana MOU” *Stabroek News* (4<sup>th</sup> November, 2010), online: *Stabroek News* < <http://www.stabroeknews.com/2010/features/11/04/annual-progress-report-on-redd-plus-enablers-%E2%80%93-2010-%E2%80%93-for-the-norway-guyana-mou/> > /

<sup>382</sup> Chris Lang, “Does Guyana's Low Carbon Development Strategy stand up?” *Independent REDD Monitor* (12, June 2009), online: *Independent RED-Monitor* < <http://www.redd-monitor.org/2009/06/12/does-guianas-low-carbon-development-strategy-stand-up/> >.

chance in late 2007, through press reports rather than consultation.<sup>383</sup> It was not until after the initial launch that the Amerindian representatives were invited to partake in the Multi-Stakeholder Steering Committee to provide input to further develop the “president’s vision” for their forest.<sup>384</sup> Despite this form of inclusion, criticisms by prominent members of civil society show that this multi-stakeholder steering committee was not participatory because it was dominated by the former president who was the mastermind behind the LCDS; it was in no sense a forum for strategic debate about developmental options and determination of priorities.<sup>385</sup> As John Palmer notes, “The MSSC is simply a theatre for the President’s ever-changing ideas. ... He decides how much and where Norwegian money is going to be spent on Amerindians.”<sup>386</sup>

In a similar manner, the drafting of the initial Forest Carbon Partnership Facility (FCPF) Readiness Plan, now termed the Readiness Preparation Proposal (RPP), has been criticized for being drafted without the full participation of Amerindian leaders and communities.<sup>387</sup> A critique of the RPP expressed by the Forest Peoples Foundation, for example, highlights the fact that the Readiness Plan was developed in a hasty manner without an inclusive public participation process and without effective participation by indigenous peoples.<sup>388</sup> As rightly explained by the Amerindian Peoples’ Association, “the right to participate is triggered at the very earliest stages of the project not after the parameters have been unilaterally predetermined by the State.”<sup>389</sup> It is clear that Amerindians did not participate effectively in the development of this plan as the government insists.

Following complaints by Amerindian leaders and civil society, the most updated Readiness Preparation Proposal mentions the future participation of Amerindians, and contribution of their traditional knowledge in the continued development of REDD+.<sup>390</sup> While

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<sup>383</sup> *Guyana Indigenous peoples, Forest and Climate Change: Rights Forest and Climate Change Briefing Series* (United Kingdom: Forest Peoples Programme, 2009) at 7.

<sup>384</sup> *Ibid.*

<sup>385</sup> Janette Bulkan, *supra* note 166; John Palmer, *supra* note 381; Open Letter from Guyanese Civil Society to Minister Erik Solheim, *supra* note 134; “Norway-Guyana Memorandum of Understanding, November 2009.”

<sup>386</sup> *Ibid.*

<sup>387</sup> Problems with the Guyana Readiness Plan (R-Plan) Submitted to the World bank Forest Carbon Partnership Facility (FCPF) (United Kingdom: Forest Peoples Programme: 2009).

<sup>388</sup> *Ibid.*

<sup>389</sup> Letter from Amerindian Peoples’ Association to Turid Johansen Arnegaard, Senior Advisor, Indigenous Peoples Issues Norwegian Agency for Development Cooperation (NORAD) (2010).

<sup>390</sup> *Guyana Readiness Preparation Proposal* (R-PP), (Washington DC: World Bank FCPF, 2010) at 45, Available at [http:// www.forestry.Gov.gy](http://www.forestry.Gov.gy).



this is a start, the language and terms are still vague. For example, how will Amerindian traditional knowledge about the forest and its sustainable use inform the development of REDD+? What role will Amerindians play in overall environmental governance? There is no mention of the role of Amerindian woman in the design and implementation of REDD+, even though women play a vital role in many forestry activities.<sup>391</sup> Is there scope for joint or co-management, since the vast portions of standing forest are found on Amerindian traditional lands and since Amerindians are responsible for conserving vast areas of these forests? This document appears to be exaggerating the role to be played by Amerindians, since there does not appear to be any mechanism that will ensure such participation. Given that Amerindians have not played a significant role in these ongoing readiness activities, it is difficult to envisage how this will substantially change in the future without explicit development of an actual process requiring substantial involvement.

Furthermore, the government has not taken any initiative to reform the current Amerindian legislation or to create any specific policy framework in line with prevailing international norms that set out clearly how communities will participate in the design of REDD+. In particular, there needs to be an articulation of what role Amerindians will play in the overall decision making and management of this initiative, how their traditional knowledge will inform the design and implementation of REDD+ activities and what role indigenous women will play in the overall design and implementation of this model. Under the current *Amerindian Act*, village councils are responsible for management, use, preservation, protection, and conservation of village lands and resources.<sup>392</sup> This right, however, is limited to titled village lands and does not extend to the so-called “state lands” that Amerindians occupy and use. Since the vast portions of Amerindian ancestral territories remain unrecognized, the legislation does not give them a voice in what takes place on these lands.

In the development of the country’s REDD+ model, the government has recognized that forest and mining laws may need to be amended to match REDD+ requirements for international standards on forestry and mining. On the other hand, no proposal has been forthcoming to appropriately amend the current Amerindian legislation to bring it in line with prevailing

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<sup>391</sup> *National Forestry Programmes: Basic Principles and Operational Guidelines*(Rome: UNFAO, 1996) at 30.

<sup>392</sup> *Amerindian Act*, *supra* note 48, sec. 14 (1) d.

international norms on indigenous peoples' rights. This shows unwillingness on the part of Guyana to truly honour its international obligations regarding indigenous peoples.

#### *Opt-In, Opt-Out Mechanism*

The only framework created by the government thus far that specifically applies to indigenous peoples is the "opt-in, opt-out mechanism." According to the Low Carbon Development Strategy, Amerindians who want to be a part of REDD+ and have a share of the potential benefits can decide to opt in to REDD+. This means that they can decide whether to place their titled forested lands under long-term protection.<sup>393</sup> It is assumed that if a community decides not to opt in, it has no say in REDD+. Moreover, it is unclear what options are available for communities who have no legal titles to land, but occupy untitled traditional lands. In the context of creating measures to promote environmental protection and efforts to conserve forests, Guyana's approach seems to contradict the spirit of the various international instruments that strive for partnerships rather than chasms between governments and indigenous peoples.

Overall, the government has failed to create the necessary space to facilitate Amerindian participation in the development of REDD+. Its actions also indicate a disregard for indigenous peoples' sovereignty, their traditional knowledge, and the important role of indigenous women. By adopting such a narrow approach to the development of REDD+, the government has denied Amerindians the opportunity to participate in shaping the outcome of REDD+. The government is also missing an opportunity to benefit from the rich knowledge indigenous peoples have about forests, by extension missing an opportunity to make a solid contribution to the enhancement of the government's conservation model. In this regard, the Government of Guyana needs to adopt policies and laws that align with prevailing international norms, such as UNDRIP, the Rio Declaration, and the Convention of Biodiversity, that will ensure Amerindians effectively participate in the further development of the country's REDD+ model.

#### *Guyana's Failure to Respect Amerindian Right to Free, Prior and Informed Consent (FPIC)*

As a party to CERD and endorser to the UNDRIP, the Government of Guyana has obligations to respect indigenous peoples' right to free, prior and informed consent in all matters

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<sup>393</sup> A Low Carbon Development Strategy, *supra* note 1 at 35.

affecting indigenous peoples' territories. CERD's 1997 General Recommendation called upon state-parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent."<sup>394</sup>

Similarly, Articles 18 and 19 of UNDRIP provide:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Although the government boasts that all REDD+ activities will be guided by the principle of FPIC,<sup>395</sup> its actions fall short of these standards. Between June and September of 2009, the government embarked on a four-month public outreach process to inform the Guyanese people of the administration plans for the forest. During this period, meetings were held with Amerindian communities regarding LCDS. The International Institute for Environment and Development (IIED), which the government had hired to independently monitor these LCDS outreach activities, concluded that the consultations met international best practice.<sup>396</sup> However, although the IIED reached this conclusion, its report documented a number of "serious limitations," which raises questions about how international best practice could be met when so many weaknesses were identified. For example, the IIED noted inappropriate approaches including the tardy delivery of the LCDS draft document to hinterland communities, the lack of a version suitable for hinterland communities, the failure to translate the document into Amerindian languages or to prepare video substitutes, and the framing of the PowerPoint document used in the hinterland consultations in language not suitable for hinterland communities. It also noted failure to establish relevant feedback mechanisms after the

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<sup>394</sup> CERD *General Recommendation XXIII (51)*, *supra* note 64.

<sup>395</sup> *A Low Carbon Development Strategy*, *supra* note 1 at 34.

<sup>396</sup> Doe *et al*, *supra* note 129 at 5.

consultations, since communities would not have much general access to internet or to the LCDS website.<sup>397</sup>

Many Amerindian leaders and rights organizations have also expressed dissatisfaction with the way in which these meetings were conducted. In a public statement in March 2010,<sup>398</sup> Amerindian leaders complained that the “meetings lacked prior information, were often rushed and only lasted a few hours and also suffered from weak or non-existent translation support.” They also expressed their concern that recommendations, made in those meeting, notably those relating to land rights and the 2006 *Amerindian Act*, have not been applied in the latest draft of the LCDS.<sup>399</sup> The Amerindian leaders stated that they did not understand what REDD+ and carbon trading are about, or how these proposals might affect the rights, interests, and way of life of Amerindian peoples. Their statement called on government and international agencies to shelve policies related to projects like the LCDS and REDD+ until free, prior and informed consent guidelines were in place.<sup>400</sup>

Both the limitations identified by the IIED and the complaints by Amerindians raise questions about whether these consultations were done in good faith and in compliance with international standards. In the case of *Saramaka People v. Suriname*,<sup>401</sup> the Inter-American Court of Human Rights emphasized that when large-scale projects could affect the integrity of the indigenous peoples’ lands and natural resources, the state has a duty not only to consult with the indigenous peoples, but also to obtain their free, prior and informed consent in accordance with their customs and traditions.<sup>402</sup> The Court observed that this is consistent with the jurisprudence of other international human rights bodies as well as with Article 32(2) of the UN Declaration on the Rights of Indigenous Peoples, which require FPIC in connection with projects that may have “a significant impact on the right of use and enjoyment of [indigenous and tribal peoples’] ancestral territories.”<sup>403</sup>

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<sup>397</sup> *Ibid.* at 6, 13.

<sup>398</sup> Gaulbert Southerland, “Indigenous leaders call for hold on LCDS, REDD+ projects” *Stabroek News* (10 March, 2010), online: *Stabroek News* < <http://www.stabroeknews.com>>; Public Statement by participants in a training of trainer workshop, *supra* note 336.

<sup>399</sup> *Ibid.*

<sup>400</sup> *Ibid.*

<sup>401</sup> *Saramaka People v. Suriname*, *supra* note 300.

<sup>402</sup> *Ibid.* paras. 133–134.

<sup>403</sup> *Ibid.* paras. 131–140

The Court explained that the principle of FPIC includes a duty to actively consult with affected communities in “good faith” and “according to their customs and traditions.” The Court has emphasized that such consultations must be conducted in accordance with their peoples’ own traditions, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community. Consultations must be undertaken through culturally appropriate procedures and with the objective of reaching an agreement. The state must ensure that the indigenous and tribal peoples are aware of possible risks, including environmental and health risks, so that the proposed project is accepted knowingly and voluntarily. While Guyana is not necessarily bound by the ruling in *Saramaka People v. Suriname* or the Forum’s guidelines, these mechanisms represent emerging standards against which the action of states can be measured.

The United Nations’ Permanent Forum on Indigenous Issues, which monitors the implementation of UNDRIP, has also emphasized that consultation should be undertaken in good faith. In this regard, indigenous peoples should be able to participate through their own freely chosen representatives and through customary or other institutions. Consultations must be in advance of commencement or authorization of activities, taking into account indigenous peoples’ own decision-making processes in all phases of the project/activity. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages. Mechanisms and procedures should be established to verify free, prior and informed consent and mechanisms of oversight and redress.<sup>404</sup>

The Permanent Forum has advised that all actors, including private enterprises, should pay due attention to the guidelines established. In Guyana’s case, this requires that consultations on REDD+ activities be carried out in a climate of mutual trust and transparency. Consultations should be done sufficiently in advance of the commencement of Guyana’s REDD+ initiatives and not in the rushed manner that Amerindians have complained of.

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<sup>404</sup> *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples.*, *supra* note 307.

Such consultations must be culturally appropriate, taking into account the traditional nature of most Amerindian communities and their isolation from technology. It must also be framed in a language Amerindians can understand; where this is not possible, translators must be provided. Consultations must provide Amerindians with all information on REDD+, including how it will impact their livelihoods, cultures, and traditional substance practices. Such information must be framed in a language that Amerindian communities can understand. Appropriate feedback mechanisms must also be established, this could include follow-up meetings with communities.

The government's actions also indicate that it has no respect for the requirement that consent should be freely given at all times and obtained without the use of fear, manipulation, or intimidation. A number of media reports accuse the government or persons associated with it using bribery and scare tactics to achieve the support of Amerindian communities regarding REDD+ activities.<sup>405</sup> According to unconfirmed reports, government officials have encouraged Amerindian leaders to write letters to the Norwegian government outlining their full support for the REDD+ activities.<sup>406</sup> The Minister of Amerindian Affairs is also reported as visiting "rebel villages," scolding the captains in front of community members, and threatening to withhold villages' money if they refuse to support the government's REDD+ initiatives.<sup>407</sup> Other Amerindian leaders have also complained of being pressured to sign documents in support of REDD+ without knowledge of their contents and without prior consultation.<sup>408</sup> There have even been reports of death threats against a prominent Amerindian rights activist and president of the Amerindian Peoples' Association.<sup>409</sup> While a direct accusation cannot be made against the government, the Association notes that these threats came at a time when the APA has been

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<sup>405</sup> Gaulbert Southerland, "Some indigenous leaders 'harassed' for voicing concerns over LCDS, REDD+ consultations- APA" *Stabroek News* (13 March 2010), online: *Stabroek News* <<http://www.stabroeknews.com>>.

<sup>406</sup> Public Statement by participants in a training of trainer workshop, *supra* note 336.

<sup>407</sup> Goodland, *supra* note 136 at 4.

<sup>408</sup> "Amerindian leaders not too happy with Jagdeo's low carbon meeting" *The Guyana Press* (3 November, 2010), online: *The Guyana Press* <<http://www.guyanapress.com/archives/1096>>.

<sup>409</sup> Amerindian Peoples' Association, Media Release, "APA concerned about the safety of its President" (10 December, 2010), online: [http://www.forestpeoples.org/sites/fpp/files/news/2010/12/Press\\_statement\\_re\\_T\\_James\\_safety\\_Dec\\_2010.pdf](http://www.forestpeoples.org/sites/fpp/files/news/2010/12/Press_statement_re_T_James_safety_Dec_2010.pdf). "Amerindian leader receives death threat for LCDS" *The Guyana Press* (18 December, 2010), online: *The Guyana Press* <<http://www.guyanapress.com/archives/3125>>.

advocating strenuously for the full respect and protection of the rights of the indigenous peoples of Guyana in national policy and programmes including the Low Carbon Development Strategy and REDD+. <sup>410</sup> As the UN Expert Mechanism and the Permanent Forum on Indigenous Issues have emphasized, the elements of free, prior and informed consent are interrelated: the elements of “free”, “prior,” and “informed” qualify and set the conditions for indigenous peoples’ consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples. <sup>411</sup> In the context of Guyana, that means that, in order for indigenous peoples’ consent to be genuine, it must be free from coercion, intimidation, or manipulation. Consent must be obtained in an atmosphere of mutual respect, good faith, and full and equitable participation, and not through the use of scare tactics, bribery, and coercion as has been practiced by Guyana’s government.

Guyana’s entire legal framework regarding FPIC stands in firm contrast with what is recognized under CERD and the United Nations Declaration on the Rights of Indigenous Peoples. Under the *Amerindian Act*, Amerindians are recognized as having jurisdiction over the forests in all their own titled lands and their consent is required for all activities that affect their titled lands. On the other hand, untitled communities have no such rights. The Government of Guyana has jurisdiction over state forests and other state lands and can therefore place such forests and lands under long-term protection. As explained by Amerindian rights activist Jean Larose, this is the heart of the problem; rights only exist in relation to titled lands. Since large portions of Amerindians’ land claims remain unresolved, this means that under the current legal framework, large areas of untitled ancestral lands could be included in a REDD+ scheme without a fair and due process that recognizes the inherent rights of Amerindians and without requiring their FPIC in relation to these lands. <sup>412</sup>

The government is operating under a fundamental misconception that FPIC is a right that it can give to Amerindians. This assumption is contrary to CERD and UNDRIP which recognize that indigenous peoples’ right to FPIC as inherent and linked to their right to self-determination. This is a fundamental principle of international law that recognizes that human beings,

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<sup>410</sup> *Ibid.*

<sup>411</sup> Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 290.

<sup>412</sup> Gaulbert Southerland, *supra* note 405.

individually and collectively, have a right to be in control of their own destinies under conditions of equality.<sup>413</sup> Article 3 of UNDRIP states that “Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development”. The right to FPIC is an integral component of indigenous peoples’ right to self-determination designed to give indigenous peoples control over matters affecting their interests. FPIC has particular relevance with respect to developmental projects being carried out on indigenous peoples’ ancestral lands and territories. The obligation of the state is to respect indigenous peoples’ right to FPIC and to adapt necessary procedures to obtain indigenous peoples’ FPIC in good faith. Guyana’s government therefore cannot give or withhold Amerindians’ right to FPIC.

Overall, the government’s treatment of Amerindians indicates a general disregard for indigenous peoples’ right to self-determination and the right to give and withhold their free, prior and informed consent. The Government of Guyana must realize that Amerindians are not simply another stakeholder to be consulted in projects affecting their territories. They have the right to free, prior and informed consent by virtue of being indigenous peoples. This right is inextricably linked to their right to self-determination and it is not something that the government can decide to give or withhold. The right exists even where indigenous territories remain unrecognized.<sup>414</sup> In this regard, the Government of Guyana needs to adopt policies and laws that align with prevailing international norms, such as UNDRIP. Clear provisions should be made for obtaining free, prior and informed consent in all projects and plans affecting indigenous peoples’ territories, including both titled and ancestral territories.

Guyana is aspiring to be a leader in environmental protection policies and should be proactive and innovative when it comes to safeguarding indigenous peoples’ rights. As this chapter demonstrates, this is not the case: Guyana has shown inertia in adopting bold policies and laws to clarify Amerindians’ outstanding tenure claims and enable their effective participation and respect for their right to free, prior and informed consent. Its actions also indicate a disregard for Amerindian self-determination, knowledge, the roles of indigenous women, and the need to respect indigenous peoples’ right to free, prior and informed consent.

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<sup>413</sup> Anaya & Williams, *supra* note 221.

<sup>414</sup> *Saramaka People v. Suriname*, *supra* note 300.



As a party and endorser to human right instruments such as UNDRIP, CERD, and CBD, among others, Guyana must respect indigenous peoples' human rights, where indigenous peoples' lands, forests, and interests may be affected. It is crucial that Guyana adopt reform measures to better safeguard Amerindian rights in the further development and implementation of the country's REDD+ model. Such measures are explored in the next chapter.

## Chapter 5

### Conclusion and Suggestions for the Way Forward

In the bid to find solutions to the global climate problem, Reducing Emissions from Deforestation and Degradation-plus (REDD+) has emerged as, potentially, a viable mitigation strategy. Currently backed by all major players in the climate change forum, REDD+ is touted as a strategy that could have one of the most revolutionary impacts on GHG emission reductions, both in terms of cost and time constraints. It is also sold as a strategy that has the potential to produce benefits that go far beyond mitigation, including poverty reduction, biodiversity protection, and a range of other positive benefits. Both the prestigious *Stern* and *Eliasch* Reviews have argued that, without REDD+, the international community would otherwise be unable to limit dangerous GHGs at a level that would avoid catastrophic climate change.

However, although REDD+ may produce benefits that go far beyond climate change mitigation, it is also increasingly recognized as being potentially harmful for those who live in and depend on forests. This includes indigenous peoples, some 60 million of whom are entirely dependent on forest resources for their livelihoods and cultural survival.<sup>415</sup> REDD+ is being negotiated in a context where indigenous peoples across the developing world lack effective rights, such as secure property rights and procedural rights, such as the right to participate in policy decisions, and the right to give or withhold their free prior and informed consent to development activities affecting their territories. As this Thesis has demonstrated, without effective legal safeguards, indigenous peoples are vulnerable to abuse and exploitation under forest governance regimes that favour the interests of commercial companies and elites. Consequently, REDD+ could repeat the mistakes of past interaction between indigenous peoples and outsiders, resulting in further dispossession, land grabs and theft, conflicts, hunger, and human rights violations, as state and non-state actors seek to benefit from new revenue flows for protecting and enhancing forests.

This danger underscores why governments and the international community seeking to promote and participate in REDD+ activities should adopt a rights-based approach to the design

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<sup>415</sup> Frederic Achard, *supra* note 173.

and implementation of REDD+ schemes. Indigenous peoples at the global level have collectively called for all climate change mitigation measures to be firmly grounded in the rights framework set forth in the 2007 UN Declaration on the Rights on Indigenous Peoples and other relevant international instruments.<sup>416</sup> These instruments are the appropriate normative framework for conceiving of and implementing measures that may affect indigenous peoples, including climate change mitigation mechanisms such as REDD+. As noted by the International Indigenous Peoples' Forum on Climate Change, REDD+ programs that do not incorporate a rights framework will not benefit indigenous peoples, but rather will result in more violations of indigenous peoples' rights. Under REDD+, states and carbon traders will take more control over the forests—homes of indigenous peoples.<sup>417</sup> Furthermore, as explained by the Office of the High Commissioner for Human Rights, “Adopting a rights-based approach, particularly one premised upon international standards and best practice in preventing and responding to the effects of global climate change serves to empower individuals and groups, who should be perceived as active agents of change and not as passive victims.”<sup>418</sup> Therefore, governments currently undertaking REDD+ initiatives must adopt a human rights approach to the design and implementation of REDD+ schemes.

The government of Guyana is among the forested nations that have taken a keen interest in participating in a future REDD+ regime. Consequently, the government has partnered with Norway to develop what it describes as an innovative model of REDD+. The treatment of Amerindians in the development of this model, however, leaves much to be desired in terms of recognition and protection of important human rights. Guyana has shown inertia against adopting appropriate policies and laws to clarify Amerindians' outstanding tenure claims and enable their effective participation and respect for their right to free, prior and informed consent. Its actions also indicate a disregard for Amerindian self-determination, traditional knowledge, the role of indigenous women.

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<sup>416</sup> UNPFII, *Permanent Forum on Indigenous Issues: Report on the seventh session (21 April–2 May 2008)*, *supra* note 214.

<sup>417</sup> Statement by the International Forum of Indigenous Peoples on Climate Change (IFIPCC), *supra* note 211.

<sup>418</sup> *Report of the Office of the United Nations High Commissioner for Human Rights*, *supra* note 172.

As party and endorser to human rights instruments such as the UNDRIP, CERD, and CDB, Guyana is obligated to respect indigenous peoples' human rights, where indigenous peoples' lands, forests, and interests may be affected. It is crucial that Guyana adopt reform measures to better safeguard Amerindian rights in the further development and implementation of the country's REDD+ model. Below is a list of recommendations that Guyana's government should embark on.

### **Legal and Policy Measures which Guyana should Adopt**

At the outset, it should be highlighted that these measures are by no means exhaustive, nor are they a panacea for all the current deficiencies in Guyana's law and policy regarding Amerindians' rights. At best, they are minimum standards that should be adopted to secure the basic human rights of Amerindian people.

#### ***Addressing the Land Issue***

Foremost is the land issue. This is a matter that should have been resolved in the 1960s and 1970s, but it has been prolonged for far too long. In this regard, the government, in collaboration with indigenous peoples and their representatives, should establish a formal dialogue geared towards establishing fair and effective criteria and processes for addressing all outstanding Amerindian land claims in Guyana.

Demarcating and delimiting titles seem to be the preferred choice for addressing indigenous peoples' land claims in Central and South America. However, in Guyana's case, this approach is rife with problems, such as granting land titles that bear little resemblance to Amerindian tenure systems and subsistence activities; demarcating Amerindian ancestral lands without Amerindians' knowledge or participation; and denying and limiting the ability of Amerindians to obtain extension of their existing titles. The process by which titles are granted is also viewed as arbitrary, because it vests in the government minister the sole authority to issue land titles and extensions to Amerindian communities. Currently, land titling proceeds on the basis that the state is the owner of all lands in Guyana and can distribute its land at its own discretion. This is a fundamental contradiction to international law, which recognizes that indigenous peoples' rights to land stem from their prior occupation of the land under customary land tenure and practices that predate colonialism. Guyana's outdated philosophy ought to be

discarded and the land titling policy should be revised to bring it into conformity with prevailing international law.

Proceeding from this new starting point, a more transparent, inclusive, and fair process should be adopted in demarcating and delimiting Amerindian lands. For example, instead of a single government minister—who will most likely represent the interest of the government—overseeing the land titling and extension application, an independent commission comprising government officials, Amerindian peoples and representatives, and experts in the field of indigenous law should review this process. Further, instead of having government surveyors demarcating Amerindian lands in accordance with often-inaccurate government maps—a practice that forms the basis of controversy—a better approach would be to work in direct partnership with indigenous communities, using their knowledge and mappings. Studies show that in some areas, using GPS and GIS technologies, Amerindians have prepared detailed maps that show the full extent both of their current and historical land occupation and use, and the boundaries of the areas that they claim.<sup>419</sup> Among the territories that have been mapped in this way are those of the Akawaio and Arekuna peoples of the Upper Mazaruni in Region VII, the Arawak communities of Moruca in Region I and the Wapichan people of the South Rupununi in Region IX. In the case of the Wapichan and Akawaio peoples, this mapping has been complemented by detailed community-driven processes to document the customary use of natural resources within these territories.<sup>420</sup> This approach to defining the traditional territory of indigenous peoples would be both more participatory and cheaper, considering that the average cost for government surveyors to demarcate land for one community is approximately GUY\$30–40 million (US\$200,000).<sup>421</sup>

Clear rules and guidelines must be established to guide the proposed commission in reaching a decision on each Amerindian community's application. Training for persons sitting on

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<sup>419</sup> Marcus Colchester, "Maps, Power and the Defense of Territory: The Upper Mazaruni Land Claim in Guyana" in Peter Brosius, Anna Lowenhaupt Tsing & Charles Zerner, eds., *Communities and Conservation: Histories and Politics of Community-Based Natural Resource Management* (Walnut Creek: AltaMira Press, 2005) at 271-303; Colchester & La Rose, *supra* note 50 at 10.

<sup>420</sup> *Ibid.*

<sup>421</sup> Pauline Sukhai, "High costs associated with the cadastral surveys" *Guyana Chronicle* (29 July, 2009), online: Guyana Chronicle < <http://guyanachronicle.com/site/> >; "It takes G\$ 30-40 Million to Demarcate a Community" *Guyana Chronicle* (29 July, 2009).

this commission must be available. One of the problems commonly encountered by indigenous peoples in making claims for lands is that the decisions are often made by non-indigenous persons who are unfamiliar with indigenous peoples' customary tenure and laws. Training therefore is important.

Undertaking these reform measures would likely satisfy CERD's recommendation for Guyana in its 2006 Concluding observations on Guyana, which urged Guyana's government to establish adequate procedures, and to define clear justice criteria to resolve land claims by indigenous communities within the domestic justice system while taking due account of relevant indigenous customary laws.<sup>422</sup> These measures would also satisfy requirements set out under UNDRIP, which obliges states to establish and implement, in conjunction with indigenous peoples, fair, independent, impartial, open, and transparent processes in accordance with indigenous peoples' laws, traditions, customs, and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories, and resources, including those which were traditionally owned or otherwise occupied or used.<sup>423</sup>

An alternative to the demarcation/delimiting process could be the establishment of a land claims mechanism, where government and indigenous representatives negotiate/mediate land claim agreements with the aim of reaching settlements that accommodate both parties' interests. Land claim negotiation has come to be seen as an effective measure in recent times. It has been used in the developed commonwealth countries such as Canada, New Zealand, and Australia.

In Canada, following the 1973 Calder decision,<sup>424</sup> the government embarked upon a policy of negotiating land claims with Aboriginal peoples. This was done under two categories. Negotiations to resolve claims that concern historic treaties operated under a Specific Claims policy, and negotiation to resolve claims where no historic treaties had been made were governed by a Comprehensive Claims process.<sup>425</sup> These negotiations have resulted in the transfer of

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<sup>422</sup> CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana, *supra* note 79.

<sup>423</sup> UNDRIP, *supra* note 67 Art. 26.

<sup>424</sup> [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

<sup>425</sup> Mark D Walters, "Promise and Paradox: The Emergence of Indigenous Rights in Canada" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds., *supra* note 222 at 35-34.

substantial portions of lands to Aboriginal peoples. Between 1975 and 2007, for example, some 861,683 and 1,192,000 square kilometres of land respectively, came under the control of Aboriginal peoples.<sup>426</sup> These negotiations have also provided for financial compensation, mechanisms for co-managing resources, and, more recently, self-government. Under the 1998 Nisga'a Treaty for example, the Nisga'a Nation in British Columbia received CAD\$190 million in compensation, in addition to recognition of ownership rights of 1,900 square kilometres of land, and self-government powers in relation to such things as land and resource use, culture and language, education, health services, child and family services, and adoption.<sup>427</sup> Comprehensive claims negotiations have also resulted in the creation of a new territory, Nunavut, in 1999 and an agreement to establish a regional Inuit government for Nunavik within the province of Quebec.<sup>428</sup>

In New Zealand, a similar type of claims settlement, though not limited to land, is ongoing under the Waitangi Tribunal and through independent negotiations with the Crown. In 1975, after a century of denying Maori treaty rights, the Waitangi Tribunal was established as a permanent commission of inquiry empowered to receive, report, and recommend on alleged Crown breaches of the Treaty of Waitangi post-1975.<sup>429</sup> In 1984, by legislation, the Tribunal was granted retrospective powers to investigate claims dating back to 1840, when the treaty was initially agreed upon.<sup>430</sup> Although the Tribunal generally can only make non-binding rather than binding recommendations to the Crown on redress for what it considers valid claims, its quarter-century's worth of work is nonetheless immense.<sup>431</sup> Following its recommendations for government actions on valid claims, the Crown has accepted many claims and has passed appropriate legislation where necessary.

With regard to historical claims pursued in the Waitangi Tribunal, the Crown's response has been to engage in a fair and final settlement process. The Crown does not require claimants

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<sup>426</sup> Bradford W. Morse, "Indigenous Peoples in Canada and their Efforts to Achieve True Reparations" in Federico Lenzerini, ed., *Reparations for Indigenous Peoples: International and Comparative Perspective* (United Kingdom, Oxford University Press, 2009).

<sup>427</sup> Walters, *supra* note 425.

<sup>428</sup> Morse, *supra* note 426.

<sup>429</sup> Jacinta RuRu, "The Maori Encounter with Aotearoa: New Zealand's Legal System" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *supra* note 222 at 120-121; See also Catherine J. Iorns Magallanes, *Summary Report on the Treaty of Waitangi- DRAFT*.

<sup>430</sup> Treaty of Waitangi Amendment Act 1985, s.3(1), amending s.6(1) Treaty of Waitangi Act 1975.

<sup>431</sup> RuRu, *supra* note 429.

to have gone first to the tribunal. The settlement process is conducted through the Office of Treaty Settlement as a separate unit within the Ministry of Justice. There are four official stages in the claims process: (1) claim preparation; (2) pre-negotiations; (3) negotiations, and (4) ratification and implementation.<sup>432</sup>

The settlements aim to provide the foundation for a new and continuing relationship between the Crown and the claimant group based upon the Treaty of Waitangi principles. The most significant pan-tribal settlements to date are the “sea lord” and “tree lord” deals, which resulted in Maori gaining compensation and significant holding in commercial fisheries in the former,<sup>433</sup> and the transfer of some 170,000 hectares of forest valued at between NZ\$170,000 and NZ\$190 million in the latter.

In Australia, after centuries of maintaining the *terra nullius* doctrine (under which Australia was considered land belonging to no one) the High Court of Australia, in *Mabo v. Queensland (No. 2)*, by a majority of 6 to 1, held that a form of native title existed in Australia where it had not been extinguished.<sup>434</sup> The *Mabo* decision forced the Australian government to enact the *Native Title Act* to address future native title claims and surrounding questions relating to it.<sup>435</sup> The government also created the National Native Title Tribunal (NNTT) as a body to administer the legislation. One of the underlying principles of the *Native Title Act* is the emphasis on agreement, making it the preferred method of dealing with native title issues and mediation as a means of encouraging agreements.<sup>436</sup> As set out under the *Native Title Act*, the process for reaching such agreements involves the following steps:

1. An application for a determination of native title is filed in the Federal Court
2. The application is sent to the Registrar of the NNTT, who undertakes various administrative procedures (including applying the registration test to each application and notifying the relevant persons and bodies and the public about each application). If the application satisfies conditions in the act, it is admitted into the Registrar of Native Title Claims.

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<sup>432</sup> Catherine J. Iorns Magallanes, *supra* note 429.

<sup>433</sup> See Treaty of Waitangi (Fisheries claim) Act settlement Act 1992 and Maori Fisheries Act (2004).

<sup>434</sup> (1992) 175 CLR 1,15.

<sup>435</sup> *Native Title Act* 1993 (Cth).

<sup>436</sup> Graeme Neate, “Agreement Making and the Native Title Act” in Marcia Langton *et al*, *Honour among Nations? Treaties and Agreements with Indigenous Peoples* (Australia: Melbourne University Press, 2005) at 179.



3. Applications for party status are assessed and determined by the federal court.

4. As a general rule, each native title application is referred to the NNTT for mediation.

A series of mediation conferences, sometimes with all parties, or with those who have a particular interest in common, is then scheduled. This is done to ascertain what the native title applicants hope to achieve from the process and to have native title rights or other parties' interest be recognized, respected, and exercised. Once an agreement is reached, the parties return to the Federal court and request a determination of native title. Overall, this approach to addressing land claims via agreement and mediation is viewed as very practical, and it enables the formation of amicable relationships between the relevant parties.<sup>437</sup>

Overall, the claim settlement processes in those states, though not complete and certainly not perfect, have resulted in indigenous peoples gaining substantial ownership of property. It should be noted, however, that much of the progress made in this area is a result of historical treaties signed between the English Crown and indigenous peoples (for example, the Treaty of Waitangi), and also because of constitutional protections of indigenous peoples' rights, as in the case of Canada.<sup>438</sup> Their application might prove difficult outside of these countries. Additionally, these claims settlement processes are not without underlying weaknesses. In Canada, for example, though they have resulted in some notable settlements, land claim negotiations are extremely slow. Moreover, the successes of these claims are highly dependent upon the leadership styles of the parties and the strength of their negotiations skills.<sup>439</sup>

In New Zealand, the primary criticism of the Waitangi Tribunal is that it is under-resourced. Under-funding has resulted in huge backlog of claims and delays in their processing. Claimants may take many years preparing the claims only to find that it takes even more years for the tribunal to process them.<sup>440</sup> There are complaints that the tribunal's processes are slow and bureaucratic, with the Crown taking an adversarial approach and continually contesting even historical evidence.<sup>441</sup> Another major criticism of the process, though not of the Tribunal itself, is that government either takes too long or refuses to implement the tribunal's recommendations.

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<sup>437</sup> *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 617.

<sup>438</sup> *Canadian Constitution Act*, 1982, s.35 (enacted as sch to the Canada Act 1982 (UK) c.11).

<sup>439</sup> Walters, *supra* note 425.

<sup>440</sup> Catherine J. Iorns Magallanes, *supra* note 429.

<sup>441</sup> *Ibid.*

In Australia, the current *Native Title Act* framework has serious limitations that impair its ability to protect the native title rights of Aboriginal people and Torres Strait Islanders. Among the principal limitations is the onerous burden of proof that is placed on claimants. Under section 223(1) of the *Native Title Act 1993*, claimants must prove that they have maintained a connection with the land through substantially uninterrupted acknowledgement and observance of their laws and customs from the time of Crown assertion of sovereignty to the present. As Kent McNeil points out, this requirement makes proof of title especially difficult for Aboriginal peoples in more populated areas whose connection to the land and observance of traditional law and customs have been severely interfered with by settlers.<sup>442</sup> The *Native Title Amendment Act 1998*<sup>443</sup>, which was adopted in response to the 1996 *Wik* decision<sup>444</sup> by the High Court of Australia, placed a number of restrictions on native title. While the Amendments did seek to enhance the claims process, it also eroded Native Title in a number of ways. Some of the deficiencies include:

1. The Act confirmed that some pastoral and mining leases that had been illegally issued between the commencement of the *Native Title Act 1993* and the *Wik* decision, extinguished native title. If the acts are previous exclusive possession acts, the extinguishment is complete; if the acts are previous non-exclusive possession acts, the extinguishment is to the extent of any inconsistency.
2. It confirmed that past grants of certain interests in land extinguished native title.
3. It confirmed that pastoralists could carry out the activities allowed by their lease, even if it affected native title.
4. Existing access rights for Indigenous people on some lands were confirmed—but only until native title claims could be heard.
5. The right to negotiate over mining was reduced to one chance only—not at each stage of exploration and mining.
6. On the issue of government and commercial development, the right to negotiate in some circumstances was reduced to the right to be 'consulted'.
7. The government was given the right to manage water resources and air space; this could weaken or even extinguish native title in many cases.
8. The Act also made it much tougher to register a native title claim, although in a way it has speeded up the claims process.

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<sup>442</sup> Kent McNeil, "Judicial Treatment of Indigenous Land Rights in the Common Law World" (2008) 4:5 CLPE Research Paper 24/2008 at 27.

<sup>443</sup> No. 97, 1998, online: Australian Government < <http://www.comlaw.gov.au> >.

<sup>444</sup> *Wik Peoples v The State of Queensland* (1996) 187 CLR 1

This legislation has been the subject of severe criticisms. Richard Barlett has termed it “a complex, substantial and specific disapplication of the protection of the Racial Discrimination Act 1975.”<sup>445</sup> Similarly, in 1999, the UN CERD Committee found that the amended NTA was in breach of the CERD in that it “discriminates against indigenous title holders by validating past acts, extinguishing native title, upgrading primary production and restricting the right to negotiate.”<sup>446</sup>

It must also be emphasized that, notwithstanding the progress made in land claim settlements in these countries, governments’ general approaches to addressing indigenous peoples’ rights fall short of prevailing international standards. After enduring centuries of land dispossession, genocide, and forced assimilation, indigenous peoples, particularly those in Australia and Canada, continue to experience high rates of poverty, alcoholism, suicide, incarceration, and a range of other social problems; they also suffer disproportionately in the health and education sectors.<sup>447</sup> These also happen to be the countries that initially rejected the vote for the adoption of the UNDRIP, although their positions have since changed. Thus, while they have made progress in land claim settlement, they are not exemplary in their treatment of indigenous peoples. Guyana may only aspire to the positive aspects of their approaches to dealing with indigenous peoples’ property rights.

In Guyana’s case, it would be better to stick with the current demarcating/delimiting approach to addressing Amerindian land claims, after addressing the underlying weaknesses that currently exist, rather than emulating flawed practices from elsewhere. This approach would also be favourable for Amerindian communities, since it does

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<sup>445</sup> Richard H. Barlett, *Native Title in Australia*, 2<sup>nd</sup> Edition (Sydney: Butterworths, 2003) at 53.

<sup>446</sup> CERD Committee, *Findings on the Native Title Amendment Act (Cth)*, UN Doc CERD/C/54/Misc.40/Rev.2 (18 March 1999) at 7.

<sup>447</sup> James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: Situation of Indigenous Peoples in Australia*, UN HRC, 15<sup>th</sup> Sess., UN Doc. A/HRC/15/37/Add4, (2010) at 10-14; Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength*, Vol.2 (Ottawa: Canada Communication Group, 1996); Rodolfo Stavenhagen, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples: Canada*, UN CHR, 61<sup>st</sup> sess., UN Doc. E/CN4./2005/88/Add.3, 2004 at Paras. 33-41, 52-59, 66-66.

not require extensive resources, or training of negotiators, lawyers, and skilled specialists in land claims processes, which might be burdensome for poor remote communities.

### ***Revise the Amerindian Act 2006***

The government in consultation with Amerindian people should move towards revising the current *Amerindian Act*. This goal of the revision should be to accord legal recognition and protection of Amerindians' rights to participate in all activities affecting their land, territories, and resources, and their right to free, prior and informed consent (FPIC) to such activities as guaranteed under the UNDRIP and the CERD Convention. This would give effect to Amerindian rights' as recognized under these instruments and would enable their full and effective participation in the areas of resource management, conservation, and overall development. It would also enable Amerindians to have greater control over their lands, territories, and resources than currently exists. A step in this direction would also indicate to Amerindians that the government is serious about protecting indigenous rights as it so often claims.

In revising the *Amerindian Act*, the government should be guided by the following items:

- (a) Article 13 of the 2003 Constitution of Guyana
- (b) Article 8 of the Convention of Biological Diversity
- (c) The Aarhus Convention (1998)
- (d) The UNDRIP
- (e) The Akwe:kon Voluntary Guidelines (2004)
- (f) UNPFII 2005 Guidelines
- (g) Guideline in Operationalizing Consent Developed under the Commission of Dams

Adopting legislation regarding Amerindians peoples' participation and FPIC should not be viewed as particularly burdensome or impossible. This would simply put in place the measures required at the global level to safeguard indigenous peoples' rights. Moreover, as pointed out in the Report of the Expert Mechanism on the Rights of Indigenous Peoples, a number of states have already taken the lead in establishing legislative and policy frameworks guaranteeing such rights. The Sámi Parliaments of Norway, Sweden, and Finland provide good examples of indigenous peoples' participation and consultation in national decision making processes.

In Sweden, the Sámi Parliament has been granted special responsibilities relating to participation in decision-making; for example, it decides on the distribution of state grants and other financing made available to the Sami; appoints the board of Sami schools; manages Sami language projects; is the administrative agency responsible for reindeer husbandry; participates in social planning and monitors compliance with Sami needs, including the interests of the reindeer industry with regard to land and water; and disseminates information on Sami conditions.<sup>448</sup> In Finland, under section 9 of the *Sámi Parliament Act of 1995*, the authorities are required to negotiate with the Sámi Parliament on all important measures that may directly affect the status of the Sámi as indigenous people.<sup>449</sup>

The Government of Norway and the Sami Parliament have reached an agreement on procedures for consultation that recognizes that the Sami have the right to be consulted on matters that may affect them directly. It sets out procedures applicable to the government and its ministries, directorates, and other subordinate state agencies or activities in matters that may affect Sami interests directly, including legislation, regulation, and specific or individual administrative decisions, guidelines, and measures.<sup>450</sup>

Developing countries such Venezuela and Peru have developed legislation on the free, prior and informed consent of indigenous peoples for all activities affecting their lands and territories, although what is on paper differs from what happens in practice. Venezuela's Law on Biodiversity, adopted in May 2000,<sup>451</sup> provides for the conservation of cultural diversity through the recognition and promotion of traditional knowledge (TK) (Article 39). Article 44 also provides that TK holders can oppose the granting of access to genetic resources or materials or TK projects in their territories or can ask for a halt to the activities that they fear might affect their cultural heritage and biological diversity. Similarly, Peru *Law 29785*,<sup>452</sup> requires the government to consult with indigenous peoples before developing new legislation or creating

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<sup>448</sup> Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 290 at para. 25

<sup>449</sup> *Ibid.* at para. 26

<sup>450</sup> *Ibid.* at para. 27

<sup>451</sup> VE024ES Other (Biodiversity), Law, 24/05/2000

<sup>452</sup> Law 29785, *supra* note 302.

of the Right to Prior Consultation to Native Towns or Oringiniarios recognized in Convention No.169 of the International Labour Organization, Available at <http://www.loc.gov/law/>.

concession for infrastructure, energy and mining projects that affect their lives, territories and rights of indigenous peoples. The law establishes that the aim of consultation is to reach agreement or consent between the state and the indigenous peoples. It recognizes the FPIC requirement for scientific research and cultural heritage, as well as for the commercial exploitation of the resources. The right to FPIC is recognized according to indigenous peoples' traditional systems of representation and customary law.

### ***Creating Policy Framework for Promoting Amerindian Participation and Respect for FPIC***

The Government of Guyana should move towards holding formal dialogues with Amerindians and their representatives to explore ways in which Amerindian participation can be bolstered and processes that result in their giving or withholding consent to projects such as REDD+ can be strengthened. In this regard, the government should consider the following:

1. Promoting capacity building in Amerindian communities, particularly in the areas of resource management, sustainable development, leadership, and governance.
2. Strengthening customary institutions and governance systems by recognizing the government structure of both titled and untitled communities and making the Tashaos Council an independent body, free from government interference.
3. Exploring ways in which the dissemination of information can be done in more understandable and accessible ways.
4. Examining ways in which Amerindian traditional environmental knowledge could play a more formidable role in conservation and sustainable development.
5. Establishing appropriate dispute settlement mechanisms and setting out how disputes will be resolved between the parties in the event they arise.
6. Emphasizing enforcement mechanisms: this is extremely important, since, currently, even where there is a strong legal mechanism to ensure participation, it could be ignored without enforcement.

### ***Adopting Co-management Schemes***

The Guyanese government should also consider the possibility of establishing a co-management/joint management scheme with Amerindian people. Co-management schemes have flourished in the post-1992 Rio Summit years, in response to the ever-increasing projects that

would otherwise end in conflicts over natural resources and their management. Such schemes have been experimented with in all parts of the world, including in Canada, the United States, Australia, Kenya, Nepal, and Latin America. Despite often important differences, these schemes share a number of common characteristics:<sup>453</sup>

- (a) A commitment to involve community members and local institutions in the management and conservation of natural resources
- (b) An interest in more often devolving power and authority from central and/or state governments to indigenous institutions and peoples
- (c) A desire to link and reconcile the objectives of socioeconomic development and environmental conservation and protection.
- (d) A belief in the desirability of including traditional values and ecological knowledge in resource management.

The overarching belief is that “bottom-up” environmental management will be more democratic because it responds to local circumstances, facilitates the deployment of indigenous knowledge in management of resources, and provides for the direct participation of local actors.<sup>454</sup> It is also seen as offering substantial promise as a way of dealing with natural resource conflicts in a participatory and equitable manner.<sup>455</sup>

However, studies have shown that these schemes have not always produced the intended results. In Kenya, Nepal, and Australia, for example, these schemes have produced the same results as top-down management schemes.<sup>456</sup> They have resulted in increased conflicts, resource appropriation by elites, and further marginalization and disempowerment of local communities, while strengthening the state’s control over resource policy, management, and allocation. On the other hand, in the United States, co-management schemes have been shown to work, but this is

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<sup>453</sup> Steven R Kellert *et al*, *Community Natural Resource Management: Promise Rhetoric and Reality* (USA: Yale University, 2000) at 706.

<sup>454</sup> I. Kapoor, “Towards Participatory Environmental Management” (2001) 63 *Journal of Environmental Management*, 269-279, cited in Marcus B. Land & Tony Corbett, “The Tyranny of Localism: Indigenous Participation in Community-based Environmental Management” (2005) 7:2 *Journal of Environmental Policy & Planning* 141- 159 at 142

<sup>455</sup> Alfonso P. Castro & Erik Nielsen, “ Indigenous People and Co-Management: Implications for Conflict Management” (2001) 4 *Environmental Science and Policy* 229-239 at 231

<sup>456</sup> Steven R Kellert *et al*, *supra* note 451 at 709-712; Marcus B. Land & Tony Corbett, *supra* note 452 at 145-156

because there was greater emphasis on mobilization of resources, and capacity- and institution-building than there had been in the aforementioned counties.

On the whole, supporters of co-management schemes argue that these arrangements can offer a socially and environmentally appropriate means of increasing local participation in resource decision-making. However, the success of such schemes is highly dependent on the nature of the negotiations involved, the intent and content of the agreement (including acknowledgment of local rights and decision-making powers), the institutional arrangements contained in the agreement, the manner of implementation, and the continued commitment of the participants.

In the context of Guyana, the creation of a co-management scheme would give Amerindians a voice in the government's REDD+ initiatives and future developmental projects. Given the current state of the forest governance regime in the country, and given the government's opposition to Amerindian rights, this might be difficult to establish at the moment, but it is not something that should be ruled out.

Finally, the government should consider working with the country's Environmental Protection Agency to update environmental and social impact assessment standards in Guyana to meet international standards and best practices. The Akwe:Kon Voluntary Guidelines, which were adopted at the Seventh Conference of the Parties to the Convention of Biological Diversity, provide good guidelines for how culturally appropriate EIA should be conducted.

### ***Possible Roles of Norway, the World Bank, and the International Community***

#### ***Norway***

Thus far, this dissertation has focused on Guyana to show that Guyana is failing to secure Amerindian rights in REDD+. However, Guyana is not developing this model in isolation; Norway is the main funder and beneficiary from this initiative, given its pledge to be carbon neutral by 2050.<sup>457</sup> Norway has taken some steps to prevent harm to indigenous peoples: the Joint Concept Note signed between the two countries requires that indigenous rights must respected

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<sup>457</sup> Alister Doyle, "Norway Aims to be Carbon Neutral by 2050" *USA Today* (19 April, 2007), online: USA Today [http://www.usatoday.com/weather/climate/globalwarming/2007-04-19-norway-emissions\\_N.htm](http://www.usatoday.com/weather/climate/globalwarming/2007-04-19-norway-emissions_N.htm)



and protected throughout Guyana's REDD+, and there must be a mechanism to enable the effective participation of indigenous peoples and other local forest communities in planning and implementing the REDD+ strategy and activities.<sup>458</sup> Norway's actions, however, raise questions about how committed Norway is to safeguarding Amerindian rights. In 2010, for example, the Amerindian Peoples Association forwarded a letter to the Norwegian Environmental Minister, outlining its concerns over the lack of effective participation by Amerindians in the design of Guyana's REDD+ model.<sup>459</sup> Norway's response showed a general unwillingness to critically examine these issues. It insisted that it was committed to working with the current framework provided by the government of Guyana, and that the Memorandum of Understanding signed by both governments had already established a number of enabling activities designed to protect the rights of the country's indigenous peoples.<sup>460</sup>

In 2010, the Forest Peoples Programme also noted that Norway's claims that, in its financing of REDD+, it would respect indigenous peoples' rights "are beginning to seem increasingly hollow."<sup>461</sup> Norway, under pressure from the government of Guyana, decided to lift the social safeguards that were attached to the establishment of the Guyana REDD Investment Fund (GRIF).<sup>462</sup> The GRIF is intended to be a special fund created for the receipt of funding from Norway, as well as all other future climate funding directed towards Guyana. The plan was that the GRIF would be managed by a reputable organization. In this case, the World Bank was chosen and the theory was it would hand money over to Guyana with due care and in accordance with the strictest safeguards. The Government of Guyana insisted that the World Bank adopt "creative instruments" for releasing Norwegian climate funds, allowing it to avoid the Bank's "safeguards" from being applied to REDD+ related projects. The Norwegian government subsequently agreed to this "creative" approach, which suggested that it was keener to move

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<sup>458</sup> Joint Concept Note, *supra* note 132.

<sup>459</sup> Letter from Amerindian Peoples' Association to Turid Johansen Arnegard, *supra* note 389.

<sup>460</sup> Letter from Torbjorn Holthe, Ambassador, Royal Norwegian Ministry of Foreign Affairs to Amerindian Peoples' Association (2010)

<sup>461</sup> "'Unsafeguarded' Norwegian money for REDD triggers controversy" *E-Newsletter* (February, 2010), online: Forest Peoples Programme <<http://www.forestpeoples.org/topics/redd-and-related-initiatives/news/2010/10/unsafeguarded-norwegian-money-redd-triggers-controv>>.

<sup>462</sup> *Ibid.*

money than to guarantee rights.<sup>463</sup> Under the new arrangement, the World Bank will release the Norwegian monies to Guyana once Guyana has reached “certain benchmark applications.” The monies will then be released to other “partner entities” once they submit project proposals related to the country’s Low Carbon Development Strategy, but these entities will then only have to apply the specific safeguards required for that project by the delivery agency.<sup>464</sup> Indigenous peoples and supporting activist groups see the World Bank safeguards as being quite strong, even if they are not perfect, in ensuring that developmental projects do not negatively impact indigenous peoples’ livelihood and cultures.<sup>465</sup> However, without the application of the World Bank safeguards, only weaker safeguards are applied, and these may not protect indigenous peoples’ rights.

Norway needs to be more proactive in investigating complaints made against Guyana’s government, particularly as it relates to indigenous peoples’ rights. Norway also needs to be more aggressive and apply pressure on Guyana to comply with the conditions of the Joint Concept Note so as to adequately safeguard indigenous peoples’ rights.

### ***The World Bank***

The World Bank is not only responsible for managing the GRIF; it is also a potential funder of Guyana’s REDD+ initiative. In June 2009, Guyana’s Readiness Plan (R-Plan) was approved by the World Bank’s Forest Carbon Partnership Facility. Guyana is likely to benefit from the Facility’s Readiness Mechanism Phase grant of US\$3.6 million to help prepare it to participate in the Carbon Finance Mechanism (or Carbon Fund) of the FCPF. In the past, the World Bank has been effective in applying pressure on Guyana to embark on reform measures regarding indigenous peoples’ rights. In 2000, for example, the World Bank shelved the country’s National Protected Area System project because the government refused to address Amerindian land rights issues.<sup>466</sup> This forced the government to reform the present *Amerindian*

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<sup>463</sup> *Ibid.*

<sup>464</sup> *Ibid.*

<sup>465</sup> “Guyana: indigenous peoples continue to be left out” E- *Newsletter* (July 2010), online: Forest Peoples Programme [http://archive.forestpeoples.org/documents/s\\_c\\_america/guyana\\_lcds\\_and\\_ips\\_jul10\\_eng.shtml](http://archive.forestpeoples.org/documents/s_c_america/guyana_lcds_and_ips_jul10_eng.shtml)

<sup>466</sup> “The Guyana National Protected Areas System Project” (Case Study presented at the workshop on Indigenous Peoples, Forest and the World Bank: Policies and Practice, Washington D.C. 9-10 May 2000) (United Kingdom: Forest Peoples Programme, 2000); C. Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners* (Washington DC: The World Bank, 2008) at 41.

*Act*, although it still contains major weaknesses. In a similar manner, the World Bank should make future funding for REDD+ contingent upon the government embarking upon reform measures to adequately safeguard Amerindian rights. This might force the government to act.

### ***The International Community***

Although a thorough discussion of the international community's role in safeguarding indigenous peoples' rights in REDD+ is beyond the scope of this dissertation, it is nevertheless worthy of brief mention. While there is general consensus at the global level that indigenous peoples' rights should be secured in REDD+ policies, to date, the international community has failed to set stringent and mandatory safeguards that countries must follow for the protection of indigenous peoples' rights in REDD+. The Cancun Agreement adopted at the COP16 sets very limited safeguards that are demoted to Annex 1 of the outcome document. Paragraph 10 indicates that safeguards by states should be merely promoted and supported. The principle of free, prior and informed consent is not included in the text; instead, developing country parties are requested to ensure full and effective participation of relevant stakeholders, *inter alia*, indigenous peoples and local communities. The annex section of the outcome document does mention the UN Declaration on the Rights of Indigenous Peoples, but instead of being an obligation, it is a safeguard that should be promoted and supported. While the document also mentions rights, there is no explicit protection of these rights. Framed in this type of language, member states are unlikely to take these safeguards seriously. As the major deliberating bodies on REDD+ policies, both the United Nations and the UNFCCC need to adopt stronger safeguards for the protection of indigenous peoples' right and make their protection obligatory for member states.

While Guyana's REDD+ model is in the interest of the nation and the world given the urgent need for solutions to the global climate crisis, this initiative could significantly harm Amerindians, principally because it is developing in a legal framework that is inadequate to safeguard their rights. Amerindians have internationally recognized human rights, which Guyana is obligated to recognize and protect. It is therefore pivotal that Guyana undertake reform measures to safeguard Amerindian rights and prevent any potential harm that might follow from the country's REDD+ initiatives, as well as in the future when Guyana enters a full-fledged REDD+ regime. Undertaking such reform measures would indeed mark a significant turning

point in Guyana's history, having regard to the historical injustices and present realities that Amerindians continue to face. It would set the stage for a new relationship between Guyana and Amerindian people, one based upon mutual respect and recognition of rights. Undertaking such reform measures would also enhance Guyana's REDD+ initiative, making it more participatory and inclusive; this could contribute to sustainability. Finally, undertaking such reform initiatives could set a good precedent for other countries that have indigenous populations and are participating in REDD+. For example, a number of African countries, including Liberia and the Republic of Congo, have expressed interest in learning from Guyana's experience with REDD+. Both of these countries have poor track records on human rights and indigenous peoples' rights. Guyana's lead role in safeguarding Amerindian rights might motivate them to undertake similar reform initiatives.

Norway, as the current funder of Guyana's REDD+ initiative, needs to be more proactive and aggressive in investigating complaints made by Amerindians, and in pressuring Guyana to comply with the conditions of the Joint Concept Note so as to adequately safeguard indigenous peoples' rights. The World Bank, as a potential funder of Guyana's REDD+ model, needs to make all funding to Guyana contingent on the government undertaking reforms to safeguard the Amerindian rights in REDD+. Finally, as the major deliberating bodies on REDD+ policies, both the United Nations and the UNFCCC need to adopt stronger safeguards for the protection of indigenous peoples' rights and make them obligatory for member states.

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